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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

—v.—

KENT L. BARWICK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE
BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

FRANK PATTON, JR.
WILLIAM LEIBOVITZ
ELLIS, STRINGFELLOW, PATTON
& LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does not the Free Exercise Clause of the First Amendment bar the application to a church of the New York City Landmarks Preservation Law where such application (a) subjects the Church to immediate, criminally enforceable governmental restrictions penalizing the failure of the Church to expend its funds for repair of its house of worship, (b) subjects the Church to immediate, criminally enforceable governmental restrictions preventing rebuilding of its house of worship as dictated by the Church's religious needs, and (c) subjects the Church's control of its house of worship to the discretionary authority of a government commission whose sole statutory standard for decisions respecting it is "the preservation of buildings of historic and aesthetic importance"—a standard which excludes any consideration of the Church's liberty to apply its property to its religious ends?

2. Does not application of the New York City Landmarks Preservation Law to the Church of St. Paul and St. Andrew constitute the taking of the Church's property for public use without just compensation in contravention of the Fifth Amendment as applied to the states through the Fourteenth Amendment?

LIST OF PARTIES

The parties in the proceedings below were:

Plaintiff (Petitioner here)

Church of St. Paul and St. Andrew*

Defendants (Respondents here)

Kent L. Barwick
William J. Conklin
Mary Childs Black
R. Michael Brown
Barbaralee Diamonstein
Thomas J. Evans
Aramina Ferrer
Charles A. Platt
Beverly Moss Spatt
Anthony M. Tung
Elliott Willensky
Constituting the Landmarks Preservation Commission of the City of New York

Edward I. Koch
Harrison J. Goldin
Carol Bellamy
Andrew J. Stein
Stanley Simon
Howard Golden
Donald R. Manes
Anthony R. Gaeta
Constituting the Members of the Board of Estimate of the City of New York

City of New York

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* In accordance with Rule 28.1, the Church of St. Paul and St. Andrew, Petitioner here, states that it is a corporation which has no parent companies, subsidiaries or affiliates to list.

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KENT L. BARWICK, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner, Church of St. Paul and St. Andrew, respectfully prays that a Writ of Certiorari issue to review the order and opinion of the New York Court of Appeals entered in the above-entitled proceeding on June 5, 1986.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reprinted in the Appendix hereto, p. 1a, and is reported at 67 N.Y.2d 510. The dissenting opinion of the New York Court of Appeals is reprinted in the Appendix hereto, p. 16a, and is reported at 67 N.Y.2d, at 525. The order of the New York Supreme Court, Appellate Division, First Judicial Department, is reprinted in the Appendix hereto, p. 34a, and is reported at 110 A.D.2d 1095, 488 N.Y.S.2d 943. The opinion of the New York Supreme Court, County of New York, is reprinted in the Appendix hereto, p. 36a, and is unreported.

JURISDICTION

The petitioner brought this suit in the New York Supreme Court, County of New York. On September 17, 1984, the New York Supreme Court, County of New York, granted the respondents' motion for summary judgment and dismissed petitioner's verified amended complaint without prejudice. Appendix, p. 46a. On petitioner's appeal the New York Supreme Court, Appellate Division, First Judicial Department, on April 25, 1985, affirmed without opinion. Appendix, p. 34a. The New York Court of Appeals granted leave to appeal, and on June 5, 1986, affirmed the order of the Appellate Division. Appendix, p. 49a. The jurisdiction of this Court to review the order and judgment of the New York Court of Appeals is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

U.S. Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

New York City Landmarks Preservation Law (N.Y.C. Admin. Code, Ch. 8-A, § 205-1.0 and § 207-1.0, *et seq.*) is reprinted in full in the Appendix hereto, p. 51a.

STATEMENT OF THE CASE

A. Statement of Facts.[1]

The Church of St. Paul and St. Andrew, constructed in 1897, occupies a tract of land at the corner of West 86th Street and West End Avenue in New York City. A parish house is attached to the Church, and the tract is also occupied by the Church's parsonage. Over the course of time, the Church buildings have fallen into a serious state of deterioration. Though the Church was designed to seat 1400 people, its membership has fallen to 250, with a regular Sunday attendance of about 100 persons. The sanctuary balcony has been closed due to its deteriorated and unsafe condition; plumbing facilities have decayed; major repairs to exterior masonry and roof are required; leaks from the roof's drainage system are damaging the interior of the building. Heating, insurance and emergency repair expenses alone consumed 70% of the donations received by the Church in 1982. Estimates of the necessary repair costs, acquired in 1982, indicated that it would cost $350,000.00 to merely effectuate repairs, a sum far beyond the financial capacity of the Church to meet.

Faced with the reality that the congregation was occupying an unsafe, decaying, and oversized structure, the congregation, with the advice of architects and other professionals, determined that its continued existence could only be guaranteed if the present Church structure were replaced, and a reliable source of income found. The Church planned to virtually demolish the present structure, and to construct a safer, more efficient and economical Church building, appropriate to the religious needs of the congregation. Along with reconstruction of the Church, the congregation was prepared to use part of its

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1 Because this petition arises from the granting of a summary judgment, the facts, including any inferences therefrom, placed in evidence by the Church of St. Paul and St. Andrew (the party opposing summary judgment) must be treated as true. *Bishop v. Wood*, 426 U.S. 341, 347 n. 11 (1976).

property to construct an income-producing apartment building. Any income from the apartment building would be used solely for the support of the Church and its various ministries.

Before the Church could begin to execute this plan, the New York City Landmarks Preservation Commission designated the Church a landmark under the New York City Landmarks Preservation Law[2] (over the Church's vigorous objection), finding the Church to be an example of 19th century architectural "eclecticism". Appendix, p. 1a. This designation was approved by the New York City Board of Estimate on March 18, 1982.

Designation as a landmark subjected the Church to an obligation, enforceable by criminal penalties, to maintain its property in good repair. Admin. Code §§ 207-10.0 and 207-16.0. Inasmuch as the congregation is unable to meet the costs of its obligation of repair under the Landmarks Law, designation of the Church as a landmark will inevitably result in the congregation's being forced to cease its religious activities. Appendix, p. 92a.

The Landmarks Law further obliges the Church to seek the permission of the Landmarks Preservation Commission prior to altering the Church structure in any way. Admin. Code § 207-4.0. Under the Law, the Church would be required to obtain the Commission's determination that any proposed alteration is architecturally appropriate. Admin. Code § 207-6.0. Alternatively, under a procedure designed to deal with "insufficient return" from its property, the Church would be required to demonstrate to the Commission's satisfaction that its house of worship had ceased to be "adequate, suitable or appropriate" for the Church's religious purposes, whereupon the Commission is authorized to either force the sale or lease of the Church to a party of the Commission's choosing, or to acquire the Church by condemnation. Admin. Code § 207-8.0.

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2 N.Y.C. Admin. Code, Ch. 8-A, §§ 205-1.0 and 207-1.0, *et seq.* (hereinafter referred to as the "Landmarks Law", and cited as "Admin. Code § ____").

B. Course of Proceedings.

Shortly after the approval of the designation of the Church as a landmark by the New York City Board of Estimate, the Church initiated this action in the New York State Supreme Court, County of New York, seeking declaratory and injunctive relief, as well as damages, on the ground that the New York City Landmarks Preservation Law was unconstitutional as applied to the Church. The action was brought under 42 U.S.C. § 1983, and charged, *inter alia*, violation of religious freedoms protected by the First Amendment to the United States Constitution, and a "taking" of the Church's property, in violation of its right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. The Church claimed, in its complaint, that application of the Law threatened its very ability to survive as a congregation, and appropriated its freedom to determine the use of its property according to the religious needs of the congregation, rather than in accordance with the aesthetic prescriptions of the Landmarks Commission. Appendix, pp. 91a-95a.

The City agencies named as defendants in the complaint moved for summary judgment in the New York Supreme Court, charging that the Church's claims were not ripe for adjudication. The Supreme Court granted the motion for summary judgment, and its decision was affirmed by the Supreme Court's Appellate Division, without opinion, and by the New York Court of Appeals. The Court of Appeals decision, authored by a majority of four justices over the dissent of the three remaining justices, held that the Church's constitutional claims were not ripe.

REASONS FOR GRANTING THE WRIT

This is a case of first impression nationally. While all fifty states and more than 500 municipalities have enacted laws for the preservation of "landmarks" (buildings with historic or aesthetic importance) (*Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 107 (1978)), this Court has never been presented the question of whether a "landmark" law may be constitutionally applied to objecting churches, where to do so would immediately subject houses of worship to limitations and controls seriously impinging upon the exercise of their ministries. The New York City Landmarks Preservation Law is a statute necessarily having that effect. The present case further puts squarely into focus a broader constitutional question never ruled upon by this Court. Tested by this Petition is whether the preservation of the historic liberties enshrined in the Religion Clauses of the First Amendment constitutes a fundamental interest of greater magnitude than societal considerations of aesthetic or cultural interests as stated in the Landmarks Law's purpose clause. Section 205-1.0.b.

The issues presented by this case are of significance nationally due not only to the prevalence of "landmark" laws, but also to the fact that litigations respecting application of such statutes to non-commercial properties, including properties required by religious bodies for the operation or existence of their missions, have taken place in many states.[3] Perhaps nowhere in the nation has this conflict been more intensive (or more clearly representative of the competing interests at stake)

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3 *Annapolis v. Anne Arundel County*, 316 A.2d 807 (Md. 1974); *Heritage Hill Association v. Grand Rapids*, 211 N.W.2d 77 (Mich. App. 1973); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. App. 1980); *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968); *First Presbyterian Church v. City Council of York*, 360 A.2d 257 (Pa. 1976); *San Antonio Conservation Society v. San Antonio*, 455 S.W.2d 743 (Tex. 1970); *State v. Seattle*, 615 P.2d 461 (Wash. 1980).

than in New York City, " 'a world-wide tourist center and world capital of business, culture and government' " (*Penn Central*, 438 U.S. at 109). Undoubtedly, in the assemblage of neighborhoods and communities within its five boroughs, New York is a microcosm of large municipalities in the United States. It is a city wherein are congregated the faithful of many religious bodies.

New York City adopted its Landmarks Law in 1965. Moving gradually about its work, the Landmarks Preservation Commission, unrestrained by any statutory exemption protecting objecting churches, pursued its roving commission to designate churches, synagogues and other religious properties as "landmarks". On May 20, 1981, New York City's religious community responded with a vigorous protest. This was followed on January 26, 1982, by the *Final Report of the Interfaith Commission to Study the Landmarking of Religious Property*, a copy of which is reprinted in the Appendix hereto.[4] Appendix, p. 124a; for a discussion by The Interfaith Commission regarding the Church of St. Paul and St. Andrew, *see*, pp. 132a-133a, 136a-137a.

From this report, and from the affidavits filed on behalf of the Church of St. Paul and St. Andrew (Appendix, pp. 100a-123a), it is apparent that the protest of the New York City

4 "In September, 1980, representatives of two small congregations on Manhattan's Upper West Side appealed to the religious leaders of the City. These two congregations had learned that their property was the subject of hearings before the Landmarks Preservation Commission and each recognized the potentially disastrous impact of a landmark designation. The Committee of Religious Leaders, representing officially the Roman Catholic, Protestant, Orthodox and Jewish Communities of the City of New York, appointed this Interfaith Commission to Study the Landmarking of Religious Property." *Final Report of the Interfaith Commission to Study the Landmarking of Religious Property*, The Committee of Religious Leaders of the City of New York (January 26, 1982). Appendix, p. 128a. It is scarcely an exaggeration to describe the response as that of "New York City's religious community". The Committee embraced the Roman Catholic Archdiocese of New York and Diocese of Brooklyn, the (Protestant and Orthodox) Council of Churches of the City of New York, the Queens Federation of Churches, and the New York Board of Rabbis, and spoke of itself as "Officially representing Roman Catholic, Protestant, Orthodox and Jewish Communities of the City of New York". Appendix, p. 125a.

religious community against imposition of landmarking on objecting churches and synagogues was not only profound, but was (and is) intensively maintained. *See*, Appendix, p. 156a, *Landmarking: Ministry vs. Mortar*, Statement of New York State Catholic Conference (April 1986). That protest found focus in the complaint filed in the present case. Appendix, p. 88a.

The Court of Appeals, affirming a grant of summary judgment against the Church, has decided substantial federal questions in conflict with applicable decisions of this Court. That conflict appears in bold relief when the application of the Landmark Law to objecting churches and synagogues is examined and, against this, the Free Exercise holdings of this Court are juxtaposed.

I. LANDMARK DESIGNATION IMPOSES IMMEDIATE AND IRREPARABLE HARM UPON AN OBJECTING CHURCH OR SYNAGOGUE.

The Church congregation which is the petitioner here does not come before the Court as any sort of "landmark", or even (in the language of the Landmarks Commission as) a " 'brilliant exemplar of the eclecticism that spread throughout American architecture in the 19th century representing a fusion of Early Christian, German Romanesque and Italian Renaissance styles." Appendix, p. 1a. Indeed, the Church does not come before the Court simply as a religious edifice. It is here as a religious organism, an indispensable part of which is its consecrated house of worship, its religiously dedicated sacred premises:

> "But you cannot sum up as merely the home of a religious movement the building where baptisms, weddings, and funerals are celebrated—not to speak of the rest. It is the home of the people, the house of God. It speaks of a real and permanent relation of God with men. It witnesses to a truth deeper and greater than the truth of human beliefs

> and ideas—the truth of that which underlies man's own existence, the Source and Ground of all Being."

A.G. HERBERT, LITURGY AND SOCIETY 41 (London 1956).

The Landmarks Law requires, as a matter of "public necessity" (§ 205-1.0.b), that the Commission legally transform a house of worship into a "landmark" if it falls within the Law's completely secular definition thereof. From the moment of designation forward, the free use of the Church edifice for the religious purposes for which solely it exists is not only curtailed, in several vital and perhaps crucial aspects, it is subject to the jurisdiction and ongoing control of a government commission.[5]

A. The Obligation to Repair

Immediately upon designation, the Church's pastor (and any other person said to be "in charge of" the Church edifice) faces monetary fines and imprisonment (Section 207-16.0.b) for failure to "keep in good repair (1) *all* of the exterior portions of [the Church] and (2) *all* interior portions thereof which, if not so maintained, *may cause or tend to cause* the exterior portions of [the Church] to deteriorate, decay or become damaged, or otherwise to fall into a state of disrepair." Section 207-10.0.a (emphasis added). The uncontested facts as presented in the affidavits of the Church's pastor, its Chairman of

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5 The Church does not here challenge the legitimacy of various building and land use laws pertaining to churches, and has not questioned the New York City zoning laws which apply to it. Zoning restrictions further an important government interest in prohibiting noxious, offensive or otherwise undesirable uses of property in a given locale. Moreover, under landmark restrictions, as contrasted against zoning requirements, "the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark at his own expense*". *Penn Central*, 438 U.S. at 140 (Rehnquist, J., dissenting) (emphasis in original).

the Board of Trustees, and its former pastor, establish that the congregation does not have the present financial wherewithal to repair the building on a day-to-day basis (Appendix, p. 105a), and that the Church has already had to cut back on its religious ministries merely to "avoid bankruptcy". Appendix, p. 102a.

It cannot be gainsaid that criminal statutes are meant to induce compliance in those persons clearly intended to be subject thereto. The designation of the Church of St. Paul and St. Andrew as a landmark is a completed act. The criminal prohibitions of the statute are thus in full force and effect with respect to it. The Church was, from the moment of designation, faced with an immediate Hobson's choice: it could seek to meet the terms of the statutory repair obligation (and therefore lose the financial ability to retain its house of worship); or its ministers and leaders could risk criminal prosecution for the sake of having the congregation retain a place of worship which is not repaired to the aesthetic satisfaction of the prosecutorial agency charged with enforcing the criminal sanctions of the Landmarks Law. It is immaterial to the question, whether the statute exerts a presently coercive effect upon the Church, that no prosecution has to date been brought. Criminal statutes are not mere suggestions—they are commands by government and obedience thereto is expected.

There was, thus, clearly a controversy ripe for adjudication between the Church and the Landmarks Commission brought on by the very fact of the Church's designation as a landmark, and the bringing to bear upon the Church of the statutory obligation to repair its decaying facility. *See*, *Colautti v. Franklin*, 439 U.S. 379, 383 n. 3 (1979); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976). In these three cases, this Court found that the lack of an imminent direct threat of prosecution was no bar to a challenge by physicians to statutory restrictions on their performance of abortions. If the applicability of a criminal statute gave rise to a justiciable controversy for those who wished to perform abortions in

violation thereof, there certainly can be no doubt that the case of a Church congregation which wishes to retain its property for the purpose of freely exercising its fundamental religious freedoms, or, alternatively, to keep its leaders out of prison, presents a ripe controversy.

This Court has found litigation to be ripe for adjudication in other instances where proof of irreparable injury has been established even though the threat of enforcement of the challenged statute is not immediate. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), Oregon had adopted a Compulsory Education Act on November 7, 1922, to be effective September 1, 1926. The case was decided by the Supreme Court June 1, 1925, approximately 14 months before the statute was to become effective. The *Pierce* plaintiffs were a religious society with religious schools in Oregon and a secular private academy. The Compulsory Education Act was directed against parents and could not have been enforced against those plaintiffs (or against anyone) until its effective date. The plaintiffs, alleging harm to their schools and parents, sought injunctive relief. The State contended that the suits were "prematurely brought". OREGON SCHOOL CASES, COMPLETE RECORD 140 (1925). The Court rejected that contention saying:

> "The suits were not premature. The injury to appellees was present and very real,—not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."

Pierce, 268 U.S. at 536.

Pierce is plainly on point. Moreover, the present case shows even more compelling reasons for judicial determination below. In *Pierce*, no enforcement of the statute was in actual progress; therefore, it constituted no part of the injury to the plaintiffs. Instead, the injury—as here—was caused simply by the existence of the statute and the promise that it would be

enforced against the schools. Many other decisions of the Supreme Court have held that a justiciable controversy exists where there is proof of a threat of irreparable harm, even though enforcement proceedings have not been instituted or threatened or are contingent. *See*, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 594-595 (1923); *Carter v. Carter Coal Co.*, 298 U.S. 238, 287-288 (1936).

The Court of Appeals verges unreality when it says that "nothing in the record suggests that imposition of criminal sanctions has been threatened or even intimated." Appendix, p. 13a. Section 207-16.0 does more than suggest or intimate criminal sanctions; it *requires* them.

The burden of the statutory repair obligation was and is severe, and seriously infringes the Church's religious liberties. Compliance with the statute diverts what little financial means the Church possesses directly away from the religious uses to which they would be put, and forces their use so as to enhance the "civic pride" and "quality of life" of New York City and its "tourists and visitors". *Penn Central*, 438 U.S. at 108-109 (1978).[6]

B. Restriction On Modification or Alteration of the Church

Again from the moment of designation as a landmark, the Church could take no steps to pull itself into a position of stabilizing its currently precarious position, or making any provision for its continued ability to exist, without first receiving the approval of the Landmarks Commission. In the present case this meant that the Church, from November 24, 1981 on, was (in the face of criminal penalties) forced to shelve its plan,

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6 The overwhelming cost involved in repairing the Church amounts to an outright denial to the Church of the "present use" of its house of worship, thus constituting a taking for purposes of the Fifth and Fourteenth Amendments. *Penn Central*, 438 U.S. at 136. The Church has no steady source of income (unlike Grand Central Terminal in the *Penn Central* case), but must rely entirely on the free-will offerings of its small membership. These offerings are incontestably too meager to meet the present cost of repair.

founded upon the urgent religious needs of its congregation, to reconstruct its decaying and disintegrating structure.

The Court of Appeals' contention that this case was not ripe for present adjudication rests upon the notion that, once the Church was transformed into a "landmark", it failed to avail itself of avenues of administrative relief open to it under the Landmarks Law. Appendix, pp. 9a-10a. The court speculates that had the Church sought a certificate of appropriateness for its rebuilding plans, pursuant to section 207-6.0, the Commission *might* have approved a specific proposal for its alteration. Appendix, pp. 12a-13a. But, as pointed out by the minority opinion below, such statutory relief is available only in situations wherein architectural appropriateness could be demonstrated by the Church. Appendix, p. 24a. Further, as the minority opinion in the Court of Appeals pointed out (Appendix, pp. 25a-26a), the administrative "hardship" proceeding, under Section 207-8.0, offered no possibility for the relief sought by the Church of St. Paul and St. Andrew since that section does not take religious damage into account, but treats solely the reasonableness of economic return on the property.[7]

But forcing the Church to resort to either of these procedures, if not futile for the Church, is certainly not only expensive and time-consuming, but is ultimately a meaningless exercise. Immurement as a "landmark" in 1981 directly thwarted the Church's own carefully designed plan for survival, and brought it into a status of "nonconsensual servitude" (*Penn Central*, 438 U.S. at 143 (Rehnquist, J., dissenting)) to the City of New York. Any determination whatsoever by the Landmarks Commission, as to any alteration of the Church, would necessarily involve the Commission in considerations of the "public interest in the maintenance of the structure." *Penn Central*, 438 U.S. at 112. But any such consideration inescapably subordinates free religious use by a

7 Such *commercial* hardship may then be remedied by the Commission's trying to produce a buyer or lessee who can profitably utilize the premises without alteration or demolition or, if this proves unavailable, by condemation. Section 207-8.0.

Church of its scared place of worship to "aesthetic, historical and architectural values." Section 207-6.0.b(2).

The Court of Appeals' application herein of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. ____, 105 S.Ct. 3108 (1985), and other decisions of the Supreme Court on ripeness is plain error. The case was, and is, ripe for adjudication. Here there was no possibility that the court would entangle itself in "abstract disagreements over administrative policies" or engage in "judicial interference" with administrative proceedings. *Abbott*, 387 U.S. at 148-149. This litigation did not await the formalizing of an administrative decision. It had nothing to do with any administrative decision. If the Church had no objections to being "landmarked" *in se*, but was contending solely that it had been improperly landmarked, or that its rebuilding would have "no effect on protected architectural features", or that its proposed construction would be "appropriate" for the purposes of the Landmarks Law, or that it would suffer insufficient return, the case might be unripe in that, at the conclusion of all administrative procedures it might be that relief allowed by the Landmarks Law would be granted. Here, however, the Church has rejected being "landmarked" and has not taken the first forbidden "ameliorative" step acknowledging that it may be.

Similar to the marketing firms involved in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. ____, 105 S. Ct. 3325, 87 L.Ed.2d 409 (1985), the Church is claiming that the injury to its constitutionally protected freedoms, caused by the landmarking process, is not a function of whether the Commission will or will not approve any rebuilding plan the Church may propose, but of the Commission's "authority to adjudicate" the matter at all. *Id.*, 87 L.Ed.2d at 419.

The Church's position is likewise similar to that of the United States in its challenge to the rate-approval authority of a state commission in *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958). There, in rejecting a contention that adjudication of the United States' constitu-

tional challenges to the California statute must await the outcome of administrative rate approval hearings (which could conceivably have resulted in an administrative decision favorable to the United States' position), this Court stated:

> "We know the statute applies to shipments of the United States. We know that it is unlawful to ship at reduced rates unless the Commission approves those rates. The question is whether the United States can be subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it. That issue is a constitutional one that the Commission can hardly be expected to entertain. If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."

Public Utilities Commission, 355 U.S. at 539-40. Though the Court, in *Public Utilities Commission*, did not employ the term "ripeness" to describe the issue there involved, the Court's statements are apposite to the Church's situation: it knows the statutory requirement applies; it knows that it is a criminal act to demolish and rebuild its house of worship except "by grace" of the Landmarks Commission (Section 207-16.0.a); and it challenges the very right of the Commission to exert this form of "prior restraint" over its fundamental religious liberties. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 556-9 (1976).

Should the Church be forced to submit any rebuilding plans for the prior approval of the Commission, there could be but one of two outcomes: (a) the Church will be permitted to pursue its plans, without change; or (b) the Church will be denied the freedom to make provision for its own religious needs in the manner it deems best fitted thereto. But if the

Church is correct in its claim that the Commission is constitutionally prohibited from encroaching in any way on its freedom to use its sacred premises, then the Commission lacks all power to disapprove the Church's plans, and Commission review is a useless, intrusive, wasteful, confiscatorially expensive exercise. Completely alien to the Commission's consideration of "architectural values" in such a proceeding is the *primary* force and consideration for the Church—the fidelity of its house of worship to the Church's religious mission to witness to, and give expression to, the reality of its Faith:

> "Our buildings must bristle with belief or they fail to advance the Christian witness . . . .
>
> . . . .
>
> "What we believe about God and man under God and about God's mighty act in His Son in our behalf and our faithful response in worship, work, and obedience are the beliefs that must motivate our planning and shape our buildings . . . . But it all begins with what we believe about God's deed for us in Christ, and the nature and the business of the church, or we build in vain.
>
> ". . . There is a difference between the Church and everything else on earth and this difference must be clearly celebrated and announced by every means we have."

EDWARD S. FREY, THIS BEFORE ARCHITECTURE 88-89 (Jenkintown, Pa. 1963).

The Court of Appeals similarly errs in its application of *Williamson County, supra*. There, adjudication of the claim of a landowner for compensation due to an alleged "taking" under a zoning ordinance was held premature because the owner had not obtained a final administrative decision, having failed to file applications for variances. Further, he had not gone through available state procedures for just compensation. In the present case, by contrast, the administrative action for which court review was sought was "final". The Church could not obtain relief *from* the statute *under* the statute. The

Church did not attack the facial validity of the Landmarks Law in all of its possible applications, but, as the Court of Appeals so well stated:

> "[I]t is evident that at the root of plaintiff's claim of injury is its aversion to ceding any control of [its] building program to the Commission—not its concern over ultimate approval of the program by the Commission."

Appendix, pp. 5a-6a. Or, put in the words of the Church's brief below, as quoted by the Court of Appeals:

> "The dispute in this case is not whether this decaying church structure is architecturally significant. Instead, the dispute is whether—after appellant has shown that its extreme financial and physical hardship blocks its fulfillment of its religious and charitable purposes—*the Church must then surrender control over rebuilding to the Landmarks Preservation Commission in order for the Church to survive—in effect, to buy its survival by giving over to the Commission control of the new structure*." (Reference omitted.) (Emphasis supplied by the court.)

Appendix, p. 6a. This, under *Williamson County* and *Abbott*, is surely a strictly "legal issue".

While the issue of whether the Landmarks Law creates excessive entanglements between government and churches was not specifically raised below as a separately cognizable violation of the Establishment Clause, it is apparent that the statute indeed requires "sustained and detailed administrative relationships for enforcement of statutory or administrative standards". *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). The regulatory relationship entailed in any Commission oversight of the Church's rebuilding plans will necessarily involve the Commission in consideration of the religious priorities and needs of the Church, a role fraught with the potential for "confrontations and conflicts" over matters of religious domain. *Walz*, 397 U.S. at 674. That entangling relationship envelopes and restricts the Church's freedom to exercise its religious liberty.

II. THE BURDENS PLACED UPON AN OBJECTING CHURCH OR SYNAGOGUE BY DESIGNATION AS A LANDMARK ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST.

The error of the Court of Appeals in holding an adjudication on the merits premature is compounded by the fact that decisions of the Supreme Court dictate the conclusion that imposition of the Landmarks Law on objecting churches and synagogues is violative of their liberties protected by the Free Exercise Clause. Even though the Church of St. Paul and St. Andrew was denied a trial in this constitutionally significant case (*see, Adickes v. Kress*, 398 U.S. 144, 160-161 (1970)), nothing could be more evident than that no compelling state interest is imaginable in the subjecting of active houses of worship to a statute encasing them in governmental judgments according to broad and highly subjective aesthetic and "historical" criteria.

Judgments of this Court on the Free Exercise of religion have recognized that exercise for what it is—a highly protected, fundamental freedom. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). No ordinary "public interest" removes the exercise of religion from its place among First Amendment freedoms:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'."

Sherbert v. Verner, 374 U.S. 398, 406 (1963).

While the Court has held that imposition of the Landmarks Law on commercial enterprises does not, in given circumstances, constitute a "taking" within the meaning of the Fifth Amendment (*Penn Central, supra*), it should hardly require

argument to establish that houses of worship are of an utterly different character constitutionally. Three dissenting Justices of the Court of Appeals stated the matter precisely:

> "As the church contends, the basic issue confronting the court is which is to be preferred—religious freedom or the exercise of the police power in furtherance of architectural and cultural interests."

Appendix, p. 16a. It could scarcely be said that the subordinating of a Church's free religious use of its house of worship to a highly subjective aesthetic or cultural regime is absolutely essential to the curbing of the "gravest abuses, endangering paramount interests."

Permitting the congregation of the Church of St. Paul and St. Andrew to take the steps needed to survive as a Church, without the secular control of the Landmarks Commission, will not harm the public health, safety or morals in any way. Nor would it have any negative effect whatsoever upon New York's tourist trade, civic pride or economy. That religious freedom could thrive in New York would be of infinitely greater value to that City's religious community, and to the City itself.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges that this Petition be granted.

Respectfully submitted,

Of Counsel:

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE

ELLIS, STRINGFELLOW, PATTON & LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180

FRANK PATTON, JR.
WILLIAM LEIBOVITZ

Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

—v.—

KENT L. BARWICK, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE
BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

FRANK PATTON, JR.
WILLIAM LEIBOVITZ
ELLIS, STRINGFELLOW, PATTON
& LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180

Counsel for Petitioner

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CHURCH OF ST. PAUL and ST. ANDREW, Appellant, v KENT L. BARWICK et al., Constituting the Landmarks Preservation Commission of the City of New York, et al., Respondents.

Argued February 4, 1986; decided June 5, 1986

AS REPORTED
67 NY2d 510 (1986)

HANCOCK, JR. J.

In this appeal in a declaratory judgment action we address a preliminary legal question: whether the claim that the Landmarks Law[1] is unconstitutional as applied to plaintiff, the

1. The New York City Landmarks Preservation Law (Administrative Code of City of New York, ch 8-A, § 205-1.0 *et seq.*) is referred to as the Landmarks Law. The agency which administers the Landmarks Law is the New York City Landmarks Preservation Commission (referred to herein as the Commission) established pursuant to New York City Charter § 534. In addition to the individual members of the Commission, the members of the Board of Estimate of the City of New York and the City of New York are included as defendants.

The Commission designated plaintiff's church a landmark on November 24, 1981, noting that it is a "brilliant exemplar of the eclecticism that spread through American architecture in the late 19th century" representing a fusion of Early Christian, German Romanesque and Italian Renaissance styles. The New York City Board of Estimate approved the designation on March 18, 1982. Plaintiff does not challenge the landmark designation per se. Five days after the Board of Estimate's approval of the designation, plaintiff commenced the instant action pursuant to 42 USC § 1983 (Civil Rights Law) and CPLR 3001 seeking a declaration that the Landmarks Law was unconstitutional as applied to it, an injunction and damages.

Church of St. Paul and St. Andrew, is ripe for judicial determination. Plaintiff's church, the attached parish house and its separate parsonage are located at West End Avenue and 86th Street in Manhattan. Because of the long-continued disrepair of the church, the expense of maintaining and heating it, and its meager financial resources, plaintiff had developed a rebuilding program which included plans for the complete renovation of the church and the construction of a commercial high-rise condominium on part of the property. Its claim stems from the designation on November 24, 1981 of its church and parish house as a landmark by the New York City Landmarks Preservation Commission.

Plaintiff does not question the facial validity of the statute. (The Landmarks Law has withstood constitutional challenge; *see*, *Penn Cent. Transp. Co. v City of New York*, 42 NY2d 324, 330, *affd* 438 US 104.) Rather, it contends that the Landmarks Law, as applied to it by virtue of the Commission's designation, effects a "taking" of property without due process or just compensation and interferes with the free exercise of its religion in contravention of various provisions of the Federal and New York State Constitutions (*see*, US Const 1st, 5th, and 14th Amends; NY Const, art I, §§ 3, 7). Plaintiff's complaint contains the allegations which this court has recognized as necessary for a charitable organization claiming an unconstitutional application of the Landmarks Law—i.e., that the statute, as applied, physically or financially prevents or seriously interferes with the carrying out of the charitable purpose (*see*, *Matter of Society for Ethical Culture v Spatt*, 51 NY2d 449, 454-455; *Lutheran Church v City of New York*, 35 NY2d 121, 131; *Matter of Trustees of Sailors' Snug Harbor v Platt*, 29 AD2d 376, 378).

On defendants' motion for summary judgment, Supreme Court dismissed the declaratory judgment action as not ripe, without prejudice to appropriate proceedings after completion of the Landmarks Law's administrative processes. The Appellate Division affirmed unanimously, without opinion (110 AD2d 1095), and we granted leave to appeal (65 NY2d 606). For reasons stated herein we conclude, as did the courts below, that until plaintiff's rebuilding plans are considered by the

Commission pursuant to the various ameliorative provisions in the Landmarks Law, the issue presented—whether the alleged interference with plaintiff's ability to carry out its charitable purpose amounts to a constitutional injury—is not ripe for judicial determination. The order of the Appellate Division should, therefore, be affirmed.

I

Recognizing the need for a comprehensive scheme to encourage the preservation of buildings and areas with historic or aesthetic importance, New York City adopted its Landmarks Preservation Law in 1965 (*see*, Administrative Code of City of New York, ch 8-A, § 205-1.0 *et seq*. The pertinent provisions of the law may be briefly summarized. The primary responsibility for administering the law is vested in the Commission, which must include at least three architects, one historian, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs (*see*, New York City Charter § 534). The Commission initially identifies properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation" (*see*, Administrative Code § 207-1.0[h]). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the statute's criteria, it will designate a building to be a "landmark" (§ 207-1.0[n]), situated on a particular "landmark site" (§ 207-1.0[o]), or will designate an area to be an "historic district" (§ 207-1.0[h]). New York City's Board of Estimate may then modify or disapprove the designation, and the owner may seek judicial review of the final decision.

Final designation as a landmark imposes certain restrictions and obligations upon an owner of a landmark site. First, the statute requires that the exterior features of the building be kept "in good repair" (*see*, § 207-10.0[a]). Violation of the maintenance and repair requirements subjects an owner to a fine of not more than $250 and not less than $25, or to imprisonment for not more than 30 days, or both (*see*, § 207-

16.0[b]). Second, the owner must apply to the Commission for advance approval of any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement (*see*, §§ 207-4.0—207-9.0).

Three separate procedures are available through which an owner may apply for administrative approval to alter a landmark site. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features", an order permitting the alteration on the ground that it will not change or affect any architectural feature of the landmark (*see*, § 207-5.0). Second, the owner may apply to the Commission for a certificate of "appropriateness" (*see*, § 207-6.0). The Commission must, with certain limited exceptions, act upon the application for such certificate within 90 days (*see*, § 207-7.0). It must grant the certificate if it concludes that the proposed construction on the landmark site "would be appropriate for and consistent with the effectuation of the purposes" (§ 207-6.0) of the Landmarks Law. Denial of either certificate is subject to judicial review. The third and final procedure—the so-called "hardship procedure" (certificate of appropriateness on the ground of "insufficient return", § 207-8.0)—provides additional options, which are for the most part limited to owners of commercial sites.[2]

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2. The procedure under Administrative Code § 207-8.0(a)(2)—available only to owners of tax-exempt properties who can satisfy four preconditions—is not applicable here. The Commission argues that, where a tax-exempt owner of a landmark site is unable to meet the preconditions, it may nevertheless make a preliminary finding of insufficient return applying the so-called judicial hardship test set forth in *Matter of Trustees of Sailors' Snug Harbor v Platt* (29 AD2d 376, 378) and subsequently adopted by this court in *Lutheran Church v City of New York* (35 NY2d 121, 131), and *Matter of Society for Ethical Culture v Spatt* (51 NY2d 449, 454-455). Because plaintiff has never sought initial Commission approval of its rebuilding program by applying for a certificate of appropriateness (*see*, § 207-6.0), we do not consider the issue, discussed at some length in the dissent (dissenting opn, at pp 534-535), whether the Commission has this power.

II

In its complaint, plaintiff does *not*, unlike petitioners in *Ethical Culture* (*supra*), *Lutheran Church* (*supra*) and *Sailors' Snug Harbor* (*supra*), base its claim of injury on being compelled by the Landmarks Law to maintain and retain an unsuitable building which it wants to demolish. Here, plaintiff does not plan to replace the designated landmark. On the contrary, it proposes to renovate the church structure under a rebuilding program with a private partner, which includes a separate development for a commercial high-rise condominium.

Plaintiff alleges that its severely deteriorating church, built to seat a congregation of 1,400, is unsuitable and far too large for its current membership. Because the financial burdens of maintaining, repairing and heating the structure had become more than its small congregation could bear, plaintiff, in the years preceding the Commission's designation on November 24, 1981, had consulted with various developers and architects for the purpose of devising a rebuilding program "to provide a new building with appropriate facilities and income for plaintiff's continuing religious and charitable program, thereby assuring its survival." In its complaint plaintiff asserts that the Commission made the designation over its objection for the purpose of preventing its building plan and that, as a result, it "is now prevented from altering or reconstructing its church building without permission of the Commission". In addition, plaintiff alleges that the designation subjects it to the immediate repair and maintenance requirements of the Landmarks Law (§ 207-10.0) which it cannot afford to fulfill and which, if not complied with, expose it to criminal sanctions (§ 207-16.0).

Although it alleges that the landmark designation was intended to prevent it from carrying out its renovation program, plaintiff has never applied for a certificate of appropriateness (*see*, § 207-6.0) or sought other approval of its plans from the Commission. Indeed, from its own formulation of the issue in its brief on appeal, it is evident that at the root of plaintiff's claim of injury is its aversion to ceding any control of the

building program to the Commission—not its concern over ultimate approval of the program by the Commission.[3]

Defendants' answer initially included failure to exhaust administrative remedies as an affirmative defense. When they moved for summary judgment[4] defendants were permitted to substitute lack of ripeness for the defense of exhaustion of remedies. The affidavits in support of defendants' motion centered on the Landmarks Law's comprehensive scheme of regulatory options under which an owner can apply to the Commission for permission to alter, reconstruct or demolish a landmark site. In his affidavit, Commission chairman, Gene A. Norman, stressing the Commission's willingness to accommodate plaintiff's needs, stated: "If plaintiff were to submit an application for a certificate of appropriateness or a notice to proceed containing a specific proposal for the Church which meets the criteria of either appropriateness under § 207-6.0 or hardship under § 207-8.0 or the judicially-created hardship test, the Commission will grant the approval or relief as provided in the statute, which may include permission to alter, reconstruct or demolish all or a portion of the designated improvement."

Defendants also submitted affidavits of two architects describing rebuilding plans submitted to plaintiff's board of

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3. Plaintiff frames the central issue in its brief as follows:

> The dispute in this case is not whether this decaying church structure is architecturally significant. Instead, the dispute is whether—after appellant has shown that its extreme financial and physical hardship blocks its fulfillment of its religious and charitable purposes—*the Church must then surrender control over rebuilding to the Landmarks Preservation Commission in order for the Church to survive—in effect, to buy its survival by giving over to the Commission control of the new structure.*" (Appellant's brief, at 7 [emphasis added].)

4. Defendant sought summary judgment upon the ground that plaintiff's complaint did not state a cause of action and that no triable issues of fact were presented, as well as on the ground of ripeness. Supreme Court treated only the latter issue and did not discuss the merits of plaintiff's complaint.

trustees in 1980 in which the exterior walls on both West End Avenue and 86th Street and the bell tower at that corner would be retained and the interior of the church rebuilt as a much smaller sanctuary. The plans included a high-rise condominium tower near the eastern portion of the site. Both architects express the belief that the Commission might approve such proposal or one similar to it which would preserve much of the existing facade and permit the erection of a commercial structure. Plaintiff has not refuted either the Commission chairman's affidavit or the affidavit of either architect.

III

It is basic that a court should decline to apply the discretionary relief of declaratory judgment (CPLR 3001; *James v Alderton Dock Yards*, 256 N.Y. 298) to "administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution" (*Abbott Labs. v Gardner*, 387 US 136, 148). The ripeness doctrine and the related rule that there must be "an actual controversy between genuine disputants with a stake in the outcome" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:3, p 356) serve the same purpose: "to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems" (4 Davis, Administrative Law, § 25:1, at 350 [2d ed]). Consistent with this general purpose we dismissed a declaratory judgment action involving the constitutionality of a statute because of the possibility that the statute would be defeated in the approaching referendum and never become law, stating that "courts should not perform useless or futile acts". (*New York Public Interest Research Group v Carey*, 42 NY2d 527, 530.) In *Matter of New York State Inspection, Sec. & Law Enforcement Employees v Cuomo* (64 NY2d 233) we restated the rule that a claim based on an injury which might never occur should be dismissed, holding that the petition of prison guards attacking plans to close a correctional facility was not ripe, because "the

harm sought to be enjoined [was] contingent upon events which may not come to pass" (*id.*, at p 240).

The particular ripeness question before us arises in a declaratory judgment action where it is claimed that constitutional harm has resulted from the application of a statute by an administrative agency. In a trilogy of decisions in declaratory judgment actions brought by drug companies to review the validity of certain administrative regulations (*Abbott Labs. v Gardner*, 387 US 136, *supra*; *Toilet Goods Assn. v Gardner*, 387 US 158; *Gardner v Toilet Goods Assn.*, 387 US 167), the Supreme Court used a two-part analysis for determining whether a pre-enforcement challenge to an administrative regulation is ripe for judicial review. It is necessary, the court stated, "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied" (387 US, at p 162; *see*, 4 Davis, *op. cit.* § 25:6, at 368, 369). We find this two-part analysis apt and particularly helpful in resolving the question here.

The "appropriateness" inquiry looks to whether the administrative action being reviewed is final and whether the controversy may be determined as a "purely legal" question (*see*, *Abbott Labs. v Gardner*, *supra*, at p 149; *Toilet Goods Assn. v Gardner*, *supra*, at p 163). The concept of finality requires an examination of the completeness of the administrative action and a pragmatic evaluation of whether the "decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*Williamson County Regional Planning Commn. v Hamilton Bank*, 473 US ____, 1055 S Ct 3108, 3120; *see*, *Abbott Labs. v Gardner*, *supra*, at pp 150-152; *Toilet Goods Assn. v Gardner*, 387 US, at pp 162, 163; *United States v Storer Broadcasting Co.*, 351 US 192, 198; 4 Davis, *op. cit.* § 25:6, at 369). In *New York Stock Exch. v Bloom* (562 F2d 736), for example, the Circuit Court for the District of Columbia found that the position taken by the Comptroller in certain opinion letters was not final and not appropriate for judicial review under the *Abbott Labs.* analysis because the

opinions were tentative in nature and subject to change (*id.*, at p 741). Even if an administrative action is final, however, it will still be "inappropriate" for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues (*see, New York Stock Exch. v Bloom, supra*, at p 741) or consideration of extraneous problems or factors beyond the legal question presented (*see, Toilet Goods Assn. v Gardner, supra*, at p 163; *see also, Babbitt v Farm Workers*, 442 US 289, 303-304, where issue of validity of access provision of a farm labor statute was not appropriate for judicial determination since it called for consideration of factors yet unknown).

The second part of the inquiry requires an evaluation of "the hardship to the parties of withholding [or granting] court consideration" (*Abbott Labs. v Gardner, supra*, at p 149). The effect on the administrative agency and its program and the need for judicial economy should be taken into account as well as the degree of hardship to the challenging party (4 Davis, *op. cit.* § 25:6, at 369). Essentially, this inquiry, from the standpoint of the challenging party, entails an examination of the certainty and effect of the harm claimed to be caused by the administrative action: whether it is "sufficiently direct and immediate" (*Abbott Labs. v Gardner, supra*, at p 152) and whether the action's "effects [have been] felt in a concrete way" (*id.*, at p 148). If the anticipated harm is insignificant, remote or contingent (*see, Matter of New York State Inspection, Sec. & Law Enforcement Employees v Cuomo*, 64 NY2d at p 240, *supra*) the controversy is not ripe.

A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. Recent decisions of the Supreme Court illustrate this rule. (*See, Williamson County Regional Planning Commn. v Hamilton Bank, supra*; *Hodel v Virginia Surface Min. & Reclamation Assn.*, 452 US 264; *Agins v Tiburon*, 447 US 255.) In *Williamson County Regional Planning Commn.* (*supra*), for example, the court held that the plaintiff's claim that

zoning laws had effected a taking of its property was not ripe because plaintiff had not sought variances which would have allowed it to develop the property; and in *Hodel v Virginia Surface Min. & Reclamation Assn.* (*supra*), the court rejected as premature plaintiff's claim that a Federal mining control statute was unconstitutional, stating: "If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. *The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution*" (452 US, at p 297 [emphasis added, n omitted]). Similarly, in *Toney v Reagan* (467 F2d 953, 956-957, *cert denied sub nom. Mabey v Reagan* 409 US 1130), the court held that the complaint of college professors allegedly threatened with discharge for advocating various causes and protesting the Viet Nam War should not be heard on the merits because plaintiffs had not attempted to avert the discharge through the administrative remedies at hand.

The ripeness requirement that a plaintiff must make use of available administrative means to forestall the alleged harm should not be confused with the requirement that administrative remedies must be exhausted before an action may be judicially reviewed (*see, Williamson County Regional Planning Commn. v Hamilton Bank*, 473 US, at p ____, 105 S Ct, at p 3120, *supra*).[5] Ripeness pertains to the administrative action

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5. Because defendants are asserting lack of ripeness as a defense—not failure to exhaust administrative remedies—we need not address plaintiff's argument concerning the applicability of the exhaustion defense to an action brought under 42 USC § 1983 (*see, Patsy v Florida Bd. of Regents*, 457 US 496). *See also, Toney v Reagan* (467 F2d 953), in which the court, in holding that "prospective, as distinguished from retrospective, state administrative remedies" need not be exhausted in an action under the Federal Civil Rights Law, noted that the "grievance procedures in this case *would not operate to rectify a wrong which had already occurred. Rather, they were a means of forestalling a threatened deprivation of rights which was not to transpire for*

which produces the alleged harm to plaintiff; the focus of the inquiry is on the finality and effect of the challenged action and whether harm from it might be prevented or cured by administrative means available to the plaintiff. The focus of the "exhaustion" requirement, on the other hand, is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted (*see, Williamson County Regional Planning Commn. v Hamilton Bank*, 473 US, at p ____, 105 S Ct, at p 3120, *supra*).

IV

We turn to whether plaintiff's claim of constitutional harm is ripe. Plaintiff, we must repeat, does not directly challenge or seek to review the Commission's act of designating its property as a landmark. The claim is that the Landmarks Law, as made applicable to plaintiff by virtue of the designation, is unconstitutional because of the effect of that statute in obstructing or interfering with plaintiff's rebuilding program and subjecting plaintiff to immediate repair and maintenance requirements which carry criminal sanctions. For several reasons, the controversy is not ripe.

Under the first *Abbott Labs.* inquiry, we find that the issue presented is not "appropriate" for judicial review. Neither the finality requirement nor the requirement that the issue be "purely legal" is met. Finality is lacking because the effect on plaintiff of being subjected to the Landmarks Law—the basis of its claim—is incomplete and undetermined. The effect cannot be measured until plaintiff has sought and the Commission has granted or denied a certificate of appropriateness (Administrative Code § 207-6.0) or other approval of its re-

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several months. In the event that appellants were to utilize the state hearing procedures, they might successfully reverse the decision not to reemploy them, have their contracts renewed, and suffer no break in their employment" (467 F2d 953, 956 [emphasis added]).

building program. Until the Commission acts, it simply cannot be said that the administrative agency has taken a definitive position "that inflicts an actual, concrete injury" (*Williamson County Regional Planning Commn. v Hamilton Bank*, *supra*, at p ____, at p 3120).

Likewise, it is clear that the requirement that the issue presented be "purely legal" is not satisfied. Plaintiff does not present the legal question of whether the Landmarks Law is invalid facially. The question is whether it is invalid in its particular application. The ultimate resolution of this constitutional issue—i.e., whether the Landmarks Law, as applied, prevents or seriously interferes with plaintiff's ability to carry out its charitable purpose (*Matter of Society for Ethical Culture v Spatt*, 51 NY2d 449, 454, 455, *supra*)—will require a careful examination of facts not yet developed pertaining to plaintiff's financial situation and to whatever action the Commission takes with respect to plaintiff's rebuilding program.

Neither does plaintiff make the second showing required under *Abbott Labs.*: that the impact of the administrative action be "direct and immediate" (*Abbott Labs. v Gardner*, 387 US, at p 152, *supra*) and "felt in a concrete way" (*id.*, at p 148). Indeed, as yet, there can be no such harm for there has been no interference. (*Compare, Matter of Society for Ethical Culture v Spatt*, *supra*; *Lutheran Church v City of New York*, *supra*; and *Matter of Trustees of Sailors' Snug Harbor v Platt*, *supra*, where the owners claimed immediate and irremediable injury from being forced to maintain outmoded and costly landmarked buildings which they sought to replace.) How much, if any, of plaintiff's rebuilding program will be thwarted and whether and to what extent it will suffer resultant constitutional harm cannot be known until the Commission acts on plaintiff's request for approval of its plans. Nor can plaintiff claim direct and immediate harm from the imposition of the Landmarks Law's repair and maintenance requirements. The plans, which it refuses to submit to the Commission for approval, include renovation of the interior and exterior of the church and would, if approved, result in compliance with the

very statutory requirements plaintiff contends the Commission's designation causes it to violate.

Finally, plaintiff's declaratory judgment action cannot be ripe to the extent that it is based on plaintiff's claim of constitutional injury from being theoretically subject to criminal sanctions for noncompliance with the Landmarks Law's repair and maintenance requirements (*see*, Landmarks Law §§ 207-10.0, 207-16.0). Plaintiff does not allege that these requirements have been enforced, and nothing in the record suggests that imposition of criminal sanctions has been threatened or even intimated. Moreover, as noted, plaintiff's claim will require a resolution of factual issues. Where, as here, a claim of unconstitutional application of a criminal statute involves factual as well as legal questions, we have held that it should be determined within the criminal proceeding itself (*see*, *Kelly's Rental v City of New York*, 44 NY2d 700, 702; *New York Foreign Trade Zone Operators v State Liq. Auth.*, 285 NY 272; *Reed v Littleton*, 275 NY 150; 3 Weinstein-Korn-Miller, NY Civ Prac ¶ 3001.06k [1985]).

We conclude, then, that regardless of the theory on which plaintiff proceeds, its constitutional claim does not present an issue that is ripe for judicial determination.

V

The question remains whether our decision on the ripeness issue should be different because plaintiff is a church and bases its constitutional claim in part on prospective interference with its right of free exercise of religion (*see*, US Const 1st Amend; NY Const art I, § 3). We think not.

We recognize that religious institutions "enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers" (*Matter of Westchester Reform Temple v Brown*, 22 NY2d 488, 496) and that courts have declined to enforce zoning ordinances, for example, where the restrictions, if enforced, would prohibit or directly impinge upon religious

uses (*see, Jewish Reconstructionist Synagogue v Incorporated Vil. of Roslyn Harbor*, 38 NY2d 283, 287-289; *Matter of Westchester Reform Temple v Brown*, 22 NY2d 488, 493, 496, *supra*; *Matter of Diocese of Rochester v Planning Bd.*, 1 NY2d 508). But no such direct impingement is involved. The ultimate effect, if any, on plaintiff's religious activities will be not direct, but purely consequential and, moreover, contingent on future developments. In any event, the merits of the constitutional claim are not before us.[6]

Irrespective of plaintiff's status as a church, the ultimate determination of the constitutional issue must depend on future developments and particularly on what action the Commission takes with respect to plaintiff's renovation plans. (*Compare, Babbitt v Farm Workers*, 442 US 289, 301-302, *supra*, and *Epperson v Arkansas*, 393 US 97, where statutes were attacked facially for unlawfully restricting speech [*Babbitt*] and as violative of the establishment clause [*Epperson*].) What plaintiff must prove to establish its constitutional claim as a charity under the established standard (*see, Matter of Society for Ethical Culture v Spatt*, 51 NY2d 449, 455, *supra*)[7] is neither dependent upon nor peculiar to its religious charac-

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6. We note that, once a claim is ripe for judicial review, the test for proving a constitutional claim originally articulated in *Sailors' Snug Harbor* applies. Regardless of whether a religious institution or a charitable organization is involved the test is the same. The plaintiff must show that maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose (*see, Matter of Society for Ethical Culture v Spatt*, 51 NY2d 449, 455; *Lutheran Church v City of New York*, 35 NY2d 121, 131; *Matter of Trustees of Sailors' Snug Harbor v. Platt*, 29 AD2d 376, 378). We note also that, although *Lutheran Church* involves a claim of unconstitutionality of the Landmarks Law by a religious organization, the opinion does not refer to the First Amendment.

7. The test originally articulated in *Sailors' Snug Harbor* is as follows: "The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. *A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose*" (29 AD2d 376, 378 [emphasis added]).

ter. Plaintiff's claim—founded on alleged interference with its building program and its inability to afford the repair requirements of the Landmarks Law—takes on incidental First Amendment overtones only because it is a church. That fact is simply not germane to the ripeness issue here.[8]

In sum, unless a special exception to the ripeness doctrine is to be created, plaintiff's status as a religious organization has no relevance. Because we find no justification for such exception, we conclude that the issue presented is not ripe for judicial determination and that it was a proper exercise of discretion to dismiss the declaratory judgment action without prejudice to being renewed after the Commission has acted on plaintiff's application for a certificate of appropriateness (Landmarks Law § 207-6.0) or for other ameliorative relief. That disposition, we believe, will promote judicial economy and spare the parties a potentially lengthy and expensive round of litigation which could turn out to be unnecessary. It will also further the purpose of the Landmarks Law and promote

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8. We have found no case dealing with the precise issue presented: whether the ripeness doctrine should be applied differently because the complaint involves a First Amendment violation. We note, however, that *the complaint of unlawful discharge of the college professors in Toney v Reagan* (467 F2d 953, *cert denied sub nom. Mabey v Reagan*, 409 US 1130 [*see*, n 5 *supra*]), was based squarely on the alleged violation of their rights of free speech under the First Amendment. In holding that the controversy was not ripe for adjudication because of plaintiffs' failure to utilize prospective administrative remedies to avert their discharge, the court did not discuss the First Amendment consideration or suggest that it had any relevance to its decision. Nothing in our holding on ripeness in *People ex rel. Arcara v Cloud Books* (65 NY2d 324), is contrary to our holding here. *Arcara* entailed legal questions concerning the District Attorney's interpretation of the statute as applied to a bookstore and whether, if so applied, the statute was unconstitutional as permitting a prior restraint. Unlike the case before us, the resolution of these issues did not involve factual questions. Moreover, the effect of the statute on the bookstore and its customers was direct and immediate because "the District Attorney [was] actually seeking to obtain the very result [i.e., the actual closure of the store] which defendant assert[ed] would be unconstitutional" (65 NY2d, at p 328, n 3).

the interest of the public and the Commission by avoiding unnecessary delay in preserving a deteriorating building of unquestioned architectural significance. The order of the Appellate Division should be affirmed, with costs.

MEYER, J. (dissenting). Because the majority's misconceptions accord the Commission a position to which neither the Constitution nor statute entitles it and which impinges upon First Amendment rights, I respectfully dissent.

As the church contends, the basic issue confronting the court is which is to be preferred—religious freedom or the exercise of the police power in furtherance of architectural and cultural interests. First Amendment rights clearly are not absolute, but just as clearly, "freedom of religion [is] in a preferred position" (*Murdock* v *Pennsylvania*, 319 US 105, 115). As between the free exercise of religion and the aesthetic and community values involved in landmark preservation, the latter is "outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community" (*Matter of Westchester Reform Temple* v *Brown*, 22 NY2d 488, 496).

Yet by construing the certificate of appropriateness provision of Administrative Code of City of New York § 207-6.0 more broadly than has the Commission itself, and ignoring the Commission's arrogation to itself, as part of the hardship procedure established by section 207-8.0, of the "judicial rule" established by *Matter of Society for Ethical Culture* v *Spatt* (51 NY2d 449); *Lutheran Church* v *City of New York* (35 NY2d 121) and *Matter of Trustees of Sailors' Snug Harbor* v *Platt* (29 AD2d 376), the majority gives the Commission greater power than accorded it by statute or prior judicial decision and in so doing subordinates religious freedom to a secular purpose of lesser importance.

I

The Church of St. Paul and St. Andrew is located on a 150-foot by 125-foot plot at the corner of West End Avenue and 86th Street in Manhattan. Situated on the plot are the church and attached parish house and a separate parsonage or rectory. In January 1980, it was notified by the Landmarks Preservation Commission that it was being considered for possible landmark designation. In opposition to the proposed designation, the church, by its then board chairman, informed the Commission that any designation would render the church insolvent and would likely cause its dissolution because the cost of repairs, as well as the continuing maintenance legally required by the landmark designation, would be impossible to meet and would bankrupt the church by 1981. Notwithstanding that opposition the Commission on November 24, 1981, designated the church and parish house,[1] but not the rectory, an official New York City landmark. Although the designation remained subject to Board of Estimate approval, the letter by which the church was notified of the designation stated that the designation was "in full force and effect from and after the date of the adoption thereof by the Commission."[2] Despite the church's similar presentation to the member of the Board of Estimate, that body approved the designation on March 18, 1982.

On June 23, 1982, the church began the present action against the city, the members of the Commission and the members of the Board of Estimate, seeking a declaratory judgment that as applied to it the Landmarks Preservation

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1. The affidavit of the Commission chairman states that only the exterior of the church and parish house were designated. The designation as contained in the record before us, however, reads "designates as a Landmark the Church of St. Paul and St. Andrew".

2. New York City Administrative Code § 207-2.0(e) so provides, subject to review by the City Planning Commission and the Board of Estimate.

Law is unconstitutional and an injunction against any action to enforce the designation, as well as damages and attorneys' fees pursuant to 42 USC §§ 1983 and 1988. The complaint alleged that the designation financially and physically prevented or seriously interfered with "the carrying out of plaintiff's religious and charitable purposes" because of the provisions of the Landmarks Preservation Law (Administrative Code §§ 207-10.0, 207-16.0[b]) which imposed immediate and mandatory exterior maintenance obligations on all designated landmarks and imposed criminal penalties for noncompliance. Both the duty to make immediate necessary repairs and the continuing obligation to meet the "good repair" provisions of the Landmarks Law, it was alleged, violated the plaintiff's constitutional right to the free exercise of religion and constituted a "taking" of its property without due process or just compensation.

Defendants moved for summary judgment, asserting, among other grounds, lack of ripeness, and submitted affirmations in support of the motion which pointed to the alternatives available to a designee under the Landmarks Law provisions for a certificate of appropriateness (Administrative Code § 207-6.0), by way of a hardship application (§ 207-8.0) and under what was referred to as "the judicially-created test for hardship set forth in *Society for Ethical Culture* v *Spatt*, 51 NY2d 449 (1980), *Lutheran Church* v *City of New York*, 35 NY2d 121 (1974) and *Sailors' Snug Harbor* v *Platt*, 29 AD2d 376 (1st Dep't 1968)." They included affidavits of architects concerning possible alterations of the church and parsonage, and an affidavit of the Commission chairman noting that the Commission had not sought either through civil or criminal proceedings to enforce the repair requirements of Administrative Code §§ 207-10.0 and 207-16.0. The latter affidavit also referred to cases in which hardship applications had been granted by the Commission but stated that it was without statutory authorization to consider the alternatives referred to above as a part of the designation proceeding under Administrative Code § 207-2.0 as the church had sought to have done.

The church's affidavits in opposition noted that although the sanctuary was designed to seat 1,400 worshippers and during the first half of the century had been filled to capacity, its membership in 1981 was approximately 250, of whom only 100 were regular Sunday worshippers. As a result, the congregation is dwarfed by the large sanctuary, which frequently cannot be used because of the prohibitive cost of heating the space.

In relation to the physical and financial condition of the church, the affidavits presented the following data: The heating bill, which was $11,400 in 1974, had advanced in 1979 to $22,500 and in 1982 totalled $34,000. Heating expense plus $9,000 for insurance and $3,000 for emergency repairs in 1982 consumed 70% of all pledges, donations and loans by members of the congregation for that year. Physically, the condition of the building is deteriorating. The Sunday school rooms are inadequate and space is lacking for retreats, seminars and other religious and charitable programs. The balcony of the sanctuary has been closed because it deteriorated to the point of being too dangerous for use. The plumbing facilities are "decrepit," lighting is poor and there are no elevators for handicapped individuals. As for the exterior, extensive repairs to the roof and masonry are required. Falling stones and masonry fragments are a danger to pedestrians. In addition, leaks in the roof drainage system have rotted large sections of wall. In 1980, it was estimated that exterior repairs in the amount of $250,000 were required. When this action was commenced in 1982, that estimate had risen to $350,000. Other than the buildings and land and a small endowment of approximately $35,000, there are few assets. The church operates with annual pledge income and donations from its membership together with other contributions, which totalled approximately $60,000 in 1982 and barely met the most necessary of salary and maintenance expenses.

In view of its fiscal situation the church established a committee on future alternatives in 1975. A real estate consultant was engaged in an effort to develop a plan that would

provide both suitable church facilities and an income source that would ensure the continuation of both its congregational and charitable programs. By August 1980, a proposed plan had been devised that would retain the exterior walls of the church fronting on 86th Street and West End Avenue and the octagonal tower at the corner, but not the square tower at the north end of the front facade or its third story and hip roof, and which would replace the remainder of the building with a new smaller sanctuary and an apartment complex at the rear of the building. It was not pursued, however, after the Commission informed the church that its landmark designation was under consideration. Based on the foregoing data and the repair and maintenance obligations imposed by the law, the church argued that the procedures provided for by statute were inapplicable, that the so-called "judicial" alternatives were not within the competence of the Commission and were ripe for judicial review because the designation with its immediate maintenance and repair obligations prevented or seriously interfered with its ability to carry on its religious and charitable purposes.

Supreme Court noted that "defendants have tacitly conceded that the Church's claims of financial hardship appear well founded,"[3] that the church's proposed plan would require demolition of exterior walls other than those fronting on 86th Street and West End Avenue and that the church's fear that by applying for administrative relief it would lose the right to control reconstruction of its building was not illogical. It concluded, however, that the interior of the buildings not having been landmarked, it was plaintiff's lack of funds, rather than the landmark designation, that was interfering with the carrying out of the church's religious and charitable activity and that, therefore, the Commission must be given the opportunity to devise alternatives before resort to judicial

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3. Defendants' brief disclaims such a concession, but for purposes of defendant's summary judgment motion the church's claims, not having been controverted in defendant's reply affidavit, must be accepted as true.

action was appropriate. Because it found the matter not ripe for adjudication, it dismissed the complaint without prejudice to appropriate proceedings after completion of the administrative process, but directed the Commission to provide for expedited consideration of any application made to it. The Appellate Division affirmed, without opinion.

II

A

Although the facial validity of the New York City Landmarks Preservation Law as a proper exercise of the police power to preserve the cultural, architectural, historical or social significance of designated properties is beyond question (*Penn Cent. Transp. Co.* v *City of New York*, 42 NY2d 324, 330, *affd* 438 US 104), the constitutionality of its application to a particular parcel turns in part upon the use of the property by its owner. When that use is secular, even though by a religious or charitable organization, the governing standard is that the owner not be deprived of a reasonable return on his property (*Matter of Society for Ethical Culture* v *Spatt*, 51 NY2d 449, 454, 456, *supra*; *Penn Cent. Transp. Co.* v *City of New York*, *supra*; *see*, *Matter of Spears* v *Berle*, 48 NY2d 254, 262; *French Investing Co.* v *City of New York*, 39 NY2d 587, *appeal dismissed and cert denied* 429 US 990). When, however, the use is for a charitable or religious purpose, the standard is that the designation "not physically or financially prevent, or seriously interfere with the carrying out of" that purpose (*Matter of Society for Ethical Culture* v *Spatt*, 51 NY2d at p 455, *supra*; *Lutheran Church* v *City of New York*, 35 NY2d, at p 131, *supra*; *Matter of Trustees of Sailors' Snug Harbor* v *Platt*, 29 AD2d 376, *supra*). This results from the "special status of religious institutions under the First Amendment" (*Jewish Reconstructionist Synagogue* v *Incorporated Vil. of Roslyn Harbor*, 38 NY2d 283, 287, 288) "which severely curtails the permissible extent of governmental regulation in

the name of the police powers" (*Matter of Westchester Reform Temple* v *Brown*, 22 NY2d 488, 496, *supra*).

When the latter standard applies and the existing building of the religious institution is totally inadequate for its legitimate needs if it is to be able freely and economically to use its premises, landmark designation which by proscribing alteration or demolition invades the owner's right to own and manage its property is unconstitutional as applied and the municipality must, then, be prepared to "provide agreeable alternatives or condemn the premises" (*Lutheran Church* v *City of New York*, 35 NY2d, at p 132, *supra*). Whether designation of particular buildings is sustainable turns on "whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure—all in the light of the purposes and resources of the petitioner" (*Matter of Trustees of Sailors' Snug Harbor* v *Platt*, 29 AD2d, at p 378, *supra*).

It is this standard—whether the designation physically or financially prevents, or seriously interferes with the carrying out of the church's religious and charitable purposes—that the majority holds is unripe for consideration without regard to plaintiff's status as a religious institution because of the availability of the certificate of appropriateness procedure, and that the Commission argues is unripe because of the availability of that procedure, the hardship procedure and the "judicial test." The arguments advanced simply do not withstand analysis.

B

The importance attached to the appropriateness procedure by the Commission is best evidenced by the fact that its brief devotes but one paragraph to it and concentrates most of its argument on the judicial test it claims power to apply in a section 207-8.0 hardship proceeding. The reason is not hard to find, for the Commission itself has construed the section 207-6.0 appropriateness procedure to apply only to architec-

tural appropriateness. Notwithstanding that fact, the majority finds plaintiff's failure to apply for a certificate of appropriateness determinative of ripeness. In doing so, it ignores both the past constructions of the section by the Commission and the wording of the governing subdivision.

Subdivision (d) deals with the considerations governing an application under section 207-6.0 with respect to an exterior designation such as is here involved. It requires that the Commission "consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value." Section 207-1.0(g) defines "exterior architectural feature" to mean "[t]he architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement."

What the provision deals with then is solely the architectural appropriateness of proposed changes, and the Commission itself has so construed it. Thus, in denying a certificate of appropriateness for a multistory office building to be constructed above Grand Central Terminal, the Commission, in reasoning applicable as well to the high-rise condominium the church proposed to erect at the rear of its plot, stated:[4]

"[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done * * * But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the

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4. Quoted in *Penn Cent. Transp. Co.* v *New York City* (438 US 104, 117-118).

existing structure and would reduce the Landmark itself to the status of a curiosity.

"Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it."

That appropriateness is limited to architectural appropriateness is borne out also by the Commission's reference, in denying an earlier proposal in the same case, to a number of instances in which it had approved additions to landmarks: "The office and reception wing added to Gracie Mansion and the school and church house added to the 12th Street side of the First Presbyterian Church are examples that harmonize in scale, material and character with the structures they adjoin. The new Watch Tower Bible and Tract Society building on Brooklyn Heights, though completely modern in idiom, respects the qualities of its surroundings and will enhance the Brooklyn Heights Historic District, as Butterfield House enhances West 12th Street, and Breuer's own Whitney Museum its Madison Avenue locale."[5] Nor has the Commission's view changed in the intervening years, for in *1025 Fifth Ave.* v *Marymount School* (123 Misc 2d 756) it denied a certificate of appropriateness to a Catholic college preparatory school which had no on-site gymnasium because the plans submitted clashed with and detracted from the facades of the school building, but then granted the college's hardship application because without the gymnasium the college buildings

5. *Id.*, 438 US, at p 118, n 18.

were inadequate for carrying out its purpose (123 Misc 2d, at pp 758-759).[6]

The majority's insistence on the church's use of the appropriateness procedure misconceives both the factual background of the present case and the statutory framework. Thus, its statement (majority opn, at p 516) that "plaintiff does *not*" assert that the Landmarks Law compels it to "maintain and retain an unsuitable building which it wants to demolish" (emphasis in original) is true only in the sense that the West End Avenue and 86th Street retaining walls and the octagonal tower would be retained. Ignored are the affidavits of Chairman Gurley and Reverend George which point up the unsuitability of the enormous sanctuary and the small and misshaped rooms used only with difficulty for other church pursuits and the consequent necessity for reduction of the sanctuary and rearrangement of the first and second floors to provide usable offices, meeting rooms and Sunday school space. Ignored also is the memorandum of the Commission's executive director reporting that the church wished "to explore having a portion of the complex demolished and a new structure built which wraps up and around the main building."

With respect to the statutory framework, the majority takes the church to task for "its aversion to ceding any control of the building program to the Commission" (majority opn, at p 517). But, as the church contends, the basic issue here is which is to be preferred—religious freedom or architectural and cultural interests. The Commission has no statutory authority to deal with the hardship issue with respect to religious and charitable organizations, that issue being for the courts. To give it the leverage to deal with appropriateness as something more than architectural appropriateness, as the

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6. The *1025 Fifth Ave.* action was instituted by two cooperative corporations owning apartment houses adjacent to the college in an effort to overturn that grant. The determination of the Commission is set forth in full as part of the record in the present case.

majority opinion does, after the designation is an accomplished fact and the religious organization incurs maintenance obligations under threat of criminal sanctions and without regard to the organization's financial situation, is in effect to permit hardship, not a function of the Commission with respect to a church, to be negotiated under the guise of appropriateness and is wholly inconsistent with the church's First Amendment rights.

C

Both the majority (n 2) and the Commission concede, as indeed they must in view of our holding in *Lutheran Church* v *City of New York* (35 NY2d, at p 124, *supra*), that section 207-8.0, involving as it does a requirement of sale or lease by the owner of the landmarked building, is inapplicable to a religious corporation[7] apart from the "judicial test" declared in *Matter of Society for Ethical Culture* v *Spatt* (*supra*); *Lutheran Church* v *City of New York* (*supra*); and *Matter of Trustees of Sailors' Snug Harbor* v *Platt* (*supra*). It is, however, a gross distortion of those cases to suggest, as does the Commission, that it, rather than the courts, is empowered to grant dispensations of the statutory requirement or to *negotiate*, rather than *provide*, "agreeable alternatives."

First, the cases themselves spell out that whether the designation as applied to a tax-exempt institution is sustainable is a question for the court, not the Commission. *Snug Harbor* expressly so stated (29 AD2d, at p 378): "However, the * * * provisions in regard to property devoted to charitable uses are limited to the instance where the institution desires to alienate

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7. The footnote appearing at page 455 of the *Ethical Culture* opinion, (51 NY2d 449) is not to the contrary. It speaks to the reasonable return requirement for private owners, not the more stringent requirement for religious and charitable institutions. The holding of *Ethical Culture* was, as already noted, that the alteration it involved was for secular rather than religious purposes.

the property by sale or lease (§ 207-8.0, subd. a, par. [1], subpar. [b], cl. [2]). We agree with Special Term that this does not render the statute unconstitutional. It must be interpreted as giving power to the commission to provide relief *in the situation covered by the statute, but not restricting the court from so doing in others.*" (Emphasis supplied.) *Lutheran Church*, which, like the present case, sought a declaration of invalidity of the landmark designation of a religious institution which had not applied for administrative relief, was decided by this court, the plaintiff's proof of economic hardship being substantially unchallenged (35 NY2d, at p 128), and the *Ethical Culture* decision, likewise by this court, turned on our conclusion that its modification was for secular rather than religious purposes.[8] Upon what authority, then, the Commission reads the test into the hardship provision of section 207-8.0 and thus empowers itself, rather than the courts, to grant dispensations of the statutory requirements is nowhere explained. Second, there is a clear anomaly in the Commission's refusal during the 15 months that it had the designation of plaintiff's church under review to consider the judicial test alternatives as part of the designation proceeding, as plaintiff requested, on the ground that the statute does not authorize it to do so, while at the same time insisting that alternatives must be sought as part of a hardship proceeding, despite the fact that the statute does not authorize that either. It is no answer to say that the statute must be read as though it had been amended by the Legislature (*see*, *People* v *Finkelstein*, 9 NY2d 342, 345), for the judicial rule can as readily be read to amend the designation procedure under Administrative Code § 207-2.0 as the hardship procedure under section 207-8.0. Third, *Lutheran Church* ruled that "[w]here the owner can make a case for alteration or demolition *the municipality would have to* relinquish the designation, *provide agreeable alternatives* or

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8. Because the Commission has not sought to controvert the church's allegation that the proposed condominium is essential to its financial survival, the same conclusion cannot be reached on the present motion.

condemn the premises" (35 NY2d, at p 132, *supra*; emphasis supplied). Just how the municipality's power to *provide* alternatives agreeable to the church has been transmogrified into authorization to the Commission to *approve* or *disapprove* the church's plan, as distinct from relinquishing the designation or condemning the premises, is nowhere revealed. Finally, it is of more than minor significance that the statute has not been amended since 1977, despite our aside in the *Penn Cent.* case,[9] for the failure of the Legislature to do so suggests a legislative intent that the issue remain one for the courts rather than the Commission (*see*, *LaGuardia* v *Cavanaugh*, 53 NY2d 67, 76).

D

It is against that background that the ripeness of the present proceeding is to be assessed. The general rule is that a request for an injunction or a declaratory judgment is premature if the harm to the plaintiff is contingent upon events that may never occur (*Matter of New York State Inspection, Sec. & Law Enforcement Employees* v *Cuomo*, 64 NY2d 233, 240; *New York Public Interest Research Group* v *Carey*, 42 NY2d 527, 531). But, as already noted, here, as in *Lutheran Church* (*supra*), plaintiff's proof of economic hardship is unchallenged by defendants on this motion and here, as in *Lutheran Church*, it was the designation, "the application of the statute to appellant's building, which enabled the appellant to relate the designation to the irreparable harm to appellant caused thereby" (27 AD2d 237, 239, *on further appeal* 42 AD2d 547, *mod, over a dissent as to ripeness*, to declare designation unconstitutional 35 NY2d 121). The more particularly is this so in view of the Administrative Code provision making the designation effective from the date of adoption (*see*, n 2, *supra*) and of the obligation thus immediately imposed, subject to criminal prosecution for noncompliance (Administrative

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9. (42 NY2d, at p 337): "The statute needs improvement. In some cases it protects property owners inadequately (*Lutheran Church in Amer.* v *City of New York*, 35 NY2d 121 * * *)."

Code § 207-16.0[b]), of maintaining in good repair not only the exterior of the church but also all interior portions that may tend to cause the exterior to deteriorate (Administrative Code § 207-10.0[a]), for even though the Commission has thus far taken no steps toward prosecution, the possibility of its doing so necessarily affects the church's actions and the allocation of its meager resources (*Abbott Labs.* v *Gardner*, 387 US 136, 152; *Phillips Petroleum Co.* v *Federal Energy Admin.*, 435 F Supp 1239, *affd sub nom. Standard Oil Co. v Department of Energy*, 596 F2d 1029).

The majority's insistence upon conserving judicial resources by subjecting the church's rebuilding plan to the Commission's approval under the guise of appropriateness misconstrues not only the appropriateness provisions of the Administrative Code but also decisional law and text authority as to ripeness.

First, it is suggested that a controversy is unripe if it involves the resolution of factual issues (majority opn, at p 519). But, as already noted, Special Term found that defendants had tacitly conceded that the church's claim of financial hardship appears well founded, and the Commission not having controverted the claims in that respect set forth in the church's affidavit answering the motion for summary judgment, those claims must be accepted as true. And, to paraphrase Davis (Administrative Law, vol 4 § 25.13, at 402 [2d ed]), with respect to a decision granting summary judgment "the facts [being] undisputed * * * the only question [is] one of law [and] the reason for relieving [plaintiff] from [its] dilemma [is] peculiarly strong". Thus, it simply begs the question to suggest, as does the majority (at p 522), that the constitutional question whether there is interference with plaintiff's ability to carry out its religious and charitable purposes requires "a careful examination of facts not yet developed pertaining to plaintiff's financial situation".[10]

10. Nor can the church's lack of funds be separated from its religious and charitable purposes as Supreme Court suggested, the proposed partial demolition and rebuilding of the church being a use of its premises not for secular purposes but to provide the means of carrying on its religious and charitable work and a use to which it is legally entitled but for the landmark designation.

Second, that criminal sanctions have not been threatened by the Commission should not foreclose consideration now of the constitutional question presented. The Landmarks Law imposes criminal sanctions for failure to carry out the affirmative duty of maintenance and repair imposed by section 207-10.0 as well as for violation of the negative limitations imposed by section 207-4.0 against constructing any improvement on the land within the landmark site or altering any improvement constituting a part of such site. The affront to plaintiff's religious freedom is that in order to achieve the financial basis necessary for it to carry out its religious and charitable work it must submit not just to the preservation of the 86th Street and West End Avenue exterior walls that have been landmarked but also to the Commission's intermeddling in its over-all rebuilding plan or establish to the satisfaction of the Commission, in the guise of the Commission providing it with a reasonable alternative, that its financial situation is such that it should be permitted to partially demolish and rebuild the existing structure.

Judicial resources are hardly conserved by forcing the litigation of a constitutional issue out of the declaratory judgment mold and into criminal litigation, except perhaps as some, less dedicated to principle than plaintiff's governing board, may be intimidated into giving up the fight. Nor do the Supreme Court cases or the text authority on which the majority relies sustain the conception that a criminal proceeding is the only answer. Indeed, *Abbott Labs.* v *Gardner* (*supra*), on which the majority so heavily relies, held "sufficiently direct and immediate as to render the issue appropriate for judicial review" the impact of regulations requiring that plaintiff incur costs in relabeling where the alternative to compliance would "risk serious criminal and civil penalties" and thus "may be even more costly" (387 US, at pp 152-153), notwithstanding the Solicitor General's representation that the Government would not enforce the regulation by criminal proceedings (*id.*, at p 154). So also in *Epperson* v *Arkansas* (393 US 97) a teacher obligated by Arkansas statute not to teach the theory of evolution was held entitled to a declaration that the statute was in violation of the

First Amendment because she faced the dilemma of teaching the statutorily condemned material or subjecting himself to dismissal and criminal prosecution.[11] And Davis tells us that the *Abbott* decision established that "governmental action is ripe for challenge when it places the challenging party in a dilemma of incurring the disadvantages of complying or risking penalties for noncompliance" (*op. cit.* § 25.7, at 373), that "[t]he general principle of ripeness law now is that a statute, regulation or policy statement is ripe for challenge when an affected person has to choose between disadvantageous compliance and risking sanctions" (*id.* § 25.13, at 393) and in an italicized statement that "[t]he basic proposition [is] that administrative action which creates a dilemma for a private party who must choose between disadvantageous compliance and risking serious penalties is ripe for challenge" (*id.* § 25.6, at 369).

Third, the majority's concept of harm is also skewed. *Abbott* teaches that it is "the hardship to the parties" that is to be considered (387 US, at p 149). Of importance, then, is whether the loss to the public will be any greater if a preenforcement suit is allowed and, even if the public loses something by preenforcement consideration, whether that loss outweighs the private advantage of allowing such a suit (Davis, *op. cit.* § 25.6, at 372; *see, National Automatic Laundry & Cleaning Council* v *Shultz*, 443 F2d 689, 702 ["The ultimate question is whether the problems generated by pre-enforcement review are of such a nature that, taken together, they outweigh the hardship and interest of plaintiff's members and establish that judicial review of the interpretative ruling should be deferred"]). There is not the least suggestion in the majority opinion or in the Commission's brief that present consideration of the issue sought to be presented by plaintiff will harm the statutory program in any way, unless we count the possible

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11. Of note in that connection is the fact, brought out in the concurring opinion of Mr. Justice Black, that though the statute was 40 years old there had "never been even a single attempt by the State to enforce it" (*id.*, at p 109).

invalidation of the Commission's effort to arrogate to itself the determination of constitutional issues which we have very plainly said is for the courts, not the Commission.

Though nothing will be gained by way of conservation of judicial resources (unless the church runs out of the physical or financial stamina with which to continue its fight) and no harm of which we can properly take cognizance can come to the Commission by entertainment now of the present action, there is a very real and immediate hardship to plaintiff. Already mentioned is the potential for interference with the religious and charitable functions of a special status institution such as the plaintiff church resulting from the maintenance and repair requirements, enforceable by criminal prosecution, which landmark designation imposes. When such consequences result from governmental action the right to be heard in oppposition, in order to be meaningful, must ordinarily occur before the action is taken (*Fuentes* v *Shevin*, 407 US 67, 80-81).[12] There is, to be sure, an exception for summary administrative action when protection of public health or safety so requires (*Hodel* v *Virginia Surface Min. & Reclamation Assn.*, 452 US 264, 299-300), but landmark designations involve cultural and aesthetic considerations, not health or safety. Moreover, there is nothing summary about the hardship procedure. Were the Commission's argument accepted substantial postdesignation time—well in excess of 180 days—would be consumed by the various steps required by section 207-8.0. But aside from the maintenance and repair requirements, the church faces the very real possibility that its program for obtaining the means necessary to carry on its religious and charitable work will be thwarted by its financial position and the time and effort to litigate through all the procedural steps to which the majority and the Commission would subject it. Thus will the very problem which created the need for rebuilding to preserve its

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12. The reference in footnote 13 of the Supreme Court's opinion in *Penn Cent. Transp. Co.* v *New York City* (438 US 104, 113) to our *Lutheran Church* opinion is not to the contrary, for, as noted above in this opinion, the *Lutheran Church* action was addressed to the designation, which was held unconstitutional as applied.

religious and charitable status be subordinated to cultural and aesthetic considerations not of equal importance constitutionally.

E

There remains for consideration the majority's argument that recent Supreme Court cases support the conclusion that the present controversy is not ripe. The cases referred to (*Williamson County Regional Planning Commn.* v *Hamilton Bank*, 473 US ____, 105 S Ct 3108; and *Hodel* v *Virginia Surface Min. & Reclamation Assn.*, *supra*) involved just compensation for the taking of commercial property, not the First Amendment and due process considerations here involved. They are, in any event, distinguishable on the additional ground that each involved a land development statute of general applicability which included provision for variance of the statutory regulation, but no provision of which imposed an immediate and affirmative obligation upon the landowner similar to the civilly and criminally enforceable maintenance and repair obligations contained in the Landmarks Preservation Law.

III

Because on the record before us the landmark designation itself inflicts immediate, concrete injury upon the protected First Amendment activities of plaintiff church, I conclude that the action is not premature. The order of the Appellate Division should, therefore, be reversed, with costs, and defendant's motion for summary judgment denied.

Chief Judge WACHTLER and Judges KAYE and TITONE concur with Judge HANCOCK, JR.; Judge MEYER dissents and votes to reverse in a separate opinion in which Judges SIMONS and ALEXANDER concur.

Order affirmed, with costs.

Order of the Appellate Division of the New York Supreme Court dated April 25, 1985

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 25, 1985.

No. 23161

Filed April 25, 1985

Present—Hon. Leonard H. Sandler,
Justice Presiding,
John Carro,
Sidney H. Asch,
Arnold L. Fein,
E. Leo Milonas,
Justices.

CHURCH OF ST. PAUL and ST. ANDREW,

Plaintiff-Appellant,

—against—

KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, and ELLIOTT WILLENSKY, CONSTITUTING THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK; EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW J. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD R. MANES, and ANTHONY R. GAETA, CONSTITUTING THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK; AND THE CITY OF NEW YORK,

Defendants-Respondents.

An appeal having been taken to this Court by the plaintiff-appellant from the order and judgment (one paper) of the Supreme Court, New York County (Robert White, J.), entered on September 17, 1984, which, *inter alia*, granted defendants' motion for summary judgment and dismissed the verified amended complaint, without prejudice to the maintenance of any appropriate proceedings after the completion of the administrative process,

And said appeal having been argued by Frank Patton, Jr., of counsel for the appellant, and by Edward F. X. Hart, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

/s/ HAROLD J. REYNOLDS,
Clerk.

Opinion of the New York Supreme Court dated August 1, 1984

SUPREME COURT: NEW YORK COUNTY
TRIAL TERM: PART XIV

Index No. 6781/1982

Cal. No. E22358

Motion Calendar of July 18th, 1984

CHURCH OF ST. PAUL AND ST. ANDREW,

Plaintiff,

—against—

KENT L. BARWICK, et al.,

Defendants.

APPEARANCES:
ELLIS STRINGFELLOW PATTON &
LEIBOVITZ
51 East 42nd Street
New York, New York 10017

By: FRANK PATTON, JR., ESQ.
(William Leibovitz, Esq.
with him on the brief)

Counsel for Plaintiff

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the City
of New York
100 Church Street
New York, New York 10007

By: SUSAN R. ROSENBERG, ESQ.
(Stephen P. Kramer, Esq.
and Jonathan Pines, Esq.
with her on the brief)
Counsel for Movants/Defendants

ROBERT E. WHITE, J.:

Plaintiff Church of St. Paul and St. Andrew ("the Church") has commenced this declaratory judgment action pursuant to 42 USC Sec. 1983* and CPLR 3001, seeking a declaration that the New York City Landmarks Law, insofar as it has been utilized to designate portions of the Church's ecclesiastical complex as a landmark, is unconstitutional as applied. The Church also seeks equitable and related relief, including attorneys' fees. (42 USC Sec. 1988).

Defendants, including the individual members of the Landmarks Preservation Commission of the City of New York, the City itself, and various municipal officials, have moved to dismiss this action on the ground that the issues presented by Plaintiff are not sufficiently ripe for adjudication. CPLR 3212.

FACTUAL AND ADMINISTRATIVE BACKGROUND

The Church owns a sizeable piece of property at the corner of West 86th Street and West End Avenue in Manhattan. On this site are a large sanctuary with an attached parish house, a rectory and a courtyard. According to the Landmarks Preser-

* "CIVIL ACTION FOR DEPRIVATION OF RIGHTS. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." Although this is a Federal statute, this Court has jurisdiction to hear claims brought thereunder. *Clark* v. *Bond Stores*, 41 AD2d 620, 340 NYS2d 847 (1st Dept. 1973).

vation Commission of the City of New York ("the Commission"), this ornate, turn-of-the-century complex represents "a masterful example of 'scientific eclecticism'." Over the objections of this Methodist congregation, the exteriors of the Church and the parish house were designated as a landmark by the Commission on November 24, 1981. The landmark designation is an unwelcome honor; Plaintiff claims that the obligations and restrictions which it imposes are financially ruinous.

Defendants have tacitly conceded that the Church's claims of financial hardship appear well-founded. According to the allegations of the Complaint, the buildings need $350,000 in immediate repair work. The Church has assets of between $35,000 and $50,000 other than these buildings, and this small financial endowment must also be utilized to finance the Church's many charitable programs.

A worshipping population of 1400 was envisioned when the structures were built. The worshipping population on any given Sunday is now approximately 100 people, although the congregation is slowly growing. The very expansiveness which is so admirable as a design element makes the sanctuary prohibitively expensive to heat and maintain. In the year after the structures were designated, heating the sanctuary consumed 57% of the entire pledges and donations of the congregation. Loose stones and masonry have fallen from the facades of these buildings, endangering passersby and raising the prospect of the Church's legal liability if anyone is injured.

The Complaint further alleges that the maintenance problem is exacerbated because the Landmarks Law imposes strict maintenance requirements on the congregation with possible criminal sanctions for noncompliance.

The papers before the Court indicate that before the landmarking process began, the Church had begun to negotiate with developers for the reconstruction of its decaying property and for the utilization of the remainder of the property for residential purposes. This would provide the Church with the financial resources which it needs while enabling it to continue to serve its parishioners and the beneficiaries of its charitable

programs. Although no formal plan for reconstruction has ever been presented to the Commission, it seems that the Church at one time wished to save the "tower" portion at the Southwest corner of the complex and encase this in a contemporary building containing residential condominiums. The Complaint alleges that the Commission designated the exteriors of the two buildings to thwart the Church's plans for their partial demolition.

During the designation process, the parties attempted to negotiate a mutually beneficial settlement incorporating the suggestions of well-known architects engaged by the Commission. However, these discussions bore no fruit. Five days after the designation was approved by the Board of Estimate, the Church commenced this action, charging an unconstitutional taking.

LEGAL ISSUES

Essentially, the Church is alleging that in view of its precarious financial condition, the designation of its property results in an unconstitutional application of the Landmarks Law; that such designation interferes with its freedom of worship; and, tracking the wording of applicable case law, the designation physically and financially prevents or seriously interferes with Plaintiff's carrying out of its religious and charitable purposes.

The initial determination to confer landmark status on a structure is based upon aesthetics; consideration of the potential financial impact upon the owner of the landmark is not a statutory requirement. Since this statute has been held to be constitutional on its face, *Penn Central Transportation Company* v. *New York City*, 42 NY2d 324, 397 NYS2d 914, 366 NE2d 1271 (1977) *aff'd* 438 US 104, 98 S Ct 2646, 57 L Ed 2d 631 (1978), the Church's argument that the Commission could not designate the structure in view of the Church's predesignation showing of hardship is unpersuasive.

Relief from the constraints imposed by the designation is provided by ameliorative post-designation procedures contained in the statute and by certain judicially-developed guide-

lines. The administrative relief contained in the Landmarks Law includes a hardship proceeding, which would permit a financially distressed organization such as Plaintiff to demolish, reconstruct or alter its landmark based upon a showing of "insufficient return." Landmarks Law, Sec. 207-8.0. This requires submission of a plan by the property owner to the Commission for demolition, alteration or reconstruction of the property. The owner may also apply to alter the landmark in some manner consistent with its architecturally distinguished features by applying for a Certificate of Appropriateness to carry on such construction. Landmarks Law, Sec. 207-6.0. There is also relief which may be fashioned under the Zoning Law. The issue before this Court, which the Church describes as one of first impression,** is whether the Church must attempt to avail itself of any of these possible forms of relief in an administrative proceeding before having the constitutionality of the designation adjudicated. This Court holds that it must do so.

The Church's position is that utilization of such procedures is not mandatory since an action brought pursuant to Section 1983 does not require exhaustion of state administrative remedies. *Patsy* v. *Florida Board of Regents*, 457 US 496, 102 S Ct 2557, 73 L Ed 2d 172 (1982).

At the argument of this motion, Defendants orally amended their Answer to withdraw their previous First Defense of failure to exhaust available administrative remedies and to substitute the defense of lack of ripeness. The exhaustion defense presupposes a well-developed adversarial posture, but concerns itself only with which forum, administrative or judicial, should resolve the dispute. The ripeness doctrine concerns itself with whether the parties' interests are sufficiently adversarial to raise a "justiciable case or controversy." The doctrines

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** The Landmarks Commission raised the same argument—lack of ripeness because of failure to utilize available administrative remedies—in *Matter of the Society for Ethical Culture in the City of New York* v. *Spatt*, 51 NY2d 449, 434 NYS2d 932, 415 NE2d 922 (1980), a facially similar situation discussed *infra*. However, the Court of Appeals' decision in that case did not directly address this issue.

are separate and distinct, and the ripeness defense is applicable here. *Ryans* v. *New Jersey Commission for the Blind and Visually Impaired*, 542 F. Supp. 841 (D.N.J. 1982); however, the application of either doctrine would produce the same result in this situation, i. e., dismissal of the action without prejudice.

Defendants' argument is that the interests of the parties are different but not necessarily adverse. Defendants wish to preserve the structure and the Church wishes to survive. Until the ameliorative provisions of the statute are utilized, Defendants reason, there is no justiciable controversy within the meaning of the declaratory judgment statute. If public and private equities cannot be balanced, then such a controversy will arise. But by extension, if an accommodation can be reached, the predicate for the rendition of a declaratory judgment will never come into being and any declaration rendered by this Court will have been made in a vacuum.

The Church contends that to the extent administrative relief does exist, it is expensive, time-consuming, vaguely defined to the potential prejudice of Plaintiff and has already been judicially determined to be inapplicable to the type of situation presented here.

The Church has also voiced a not-illogical fear that the Commission might fashion a form of "relief" which would result in the Church's total loss of these structures or the loss of the right to control their reconstruction. Condemnation is an alternative available to the Commission if the parties cannot agree on a solution to the dispute. And it bears mentioning at this point that if the property ceases to be used for Church purposes, it will revert to the denomination.

There are three leading cases which set forth the relief available to charities whose landmarked properties have become burdensome or unsuitable for their needs. Plaintiff relies heavily upon the holding in one of these, *Lutheran Church in America* v. *City of New York*, 35 NY2d 121, 359 NYS2d 7, 316 NE2d 305 (1974).

In *Lutheran Church*, the issue, as framed by the Court of Appeals, was whether landmark designation of individual properties remaining in private ownership was constitutional in cases where the owner of the property was organized for charitable purposes and was able to demonstrate some sort of hardship, economic or otherwise, as a result of the designation. In considering the composition of the statute, the Court commented:

> ". . . the statutory scheme (virtually all of section 207-8.0), providing for alternate proposals and perhaps ultimate condemnations in cases where economic return is insufficient or where there is no wish by the owner to sell or lease the property, is not applicable here. *Plaintiff is a charitable organization and not otherwise subject to the various administrative alternatives set up in section 207-8.0.* . . . We save for another day consideration of those provisions where sought to be applied." (at 35 NY2d 131-132; emphasis this Court's).

Based upon this language, Plaintiff contends that the hardship procedure set out in the statute is inapplicable to it. However, the Court in *Lutheran Church* fashioned an alternative remedy applicable to charities by adopting the holding of an earlier case, *Matter of Trustees of Sailors' Snug Harbor* v. *Platt*, 29 AD2d 376, 288 NYS2d 314 (1st Dept. 1968). Where landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose, it would be invalid under this "judicial test". The Commission has the power to fashion relief under the judicial test which goes beyond the letter of the statute. See e.g. *1025 Fifth Avenue, Inc.* v. *Marymount School of New York*, Index No. 14910/83, NYLJ 12-30-83, p. 6 col. 1 (Sup Ct. NY Co.). So even if the administrative proceeding on the books is not strictly applicable to Plaintiff, the Commission still has the power to consider an application made by the Church and to fashion relief.

Other language in *Lutheran Church* leads to the conclusion that until the Church has applied to the Commission for

ameliorative relief and remains aggrieved in some manner after the Commission has acted, the matter is not ripe for adjudication. In *Lutheran Church*, the Court of Appeals concluded, after considering the impact of the statute upon owners of property devoted to charitable use:

> "Where the owner can make a case for alteration or demolition the municipality would have to relinquish the designation, provide agreeable alternatives or condemn the premises." (35 NY2d at 132).

The logical inference to be drawn from this, in view of the statutory objective of balancing public and private interests, is that Defendants must be given the opportunity to formulate such "agreeable alternatives" before resorting to either of the more radical steps.

Nor is this Court persuaded that the vagueness of the Commission's mandate to fashion appropriate relief should act as a total bar to the utilization of available administrative remedies. The Commission has used the flexibility created by precedent in several other situations to the apparent satisfaction of the owner/applicant, and it is entitled to the presumption that it will bring its expertise to bear on the Church's application in a reasonable and constitutional fashion. The Court of Appeals, while upholding the facial validity of the statute, has commented on its deficiencies and has noted that it provides inadequate protection for some property owners. *Penn Central Transportation Company* v. *New York City, supra*. Presumably as a result of such recognition, the Commission has enjoyed wide, judicially-sanctioned latitude in fashioning relief for applicants. This is wholly proper. It is not merely the drafting difficulties apparent in the statute which necessitate such broad discretion, but the obvious impossibility of the drafters to provide for every permutation of aesthetic merit and individual hardship. And any complaints about lack of administrative due process are also unripe, and must await the completion of proceedings before the Commission.

The judicial test has been applied in one instance to a religious institution which, like Plaintiff, sought to develop its

property so that it could gain income from rental, non-religious tenants. *Matter of the Society for Ethical Culture in the City of New York* v. *Spatt*, 68 AD2d 112, 416 NYS2d 246 (1st Dept. 1979), aff'd 51 NY2d 449, 434 NYS2d 932, 415 NE2d 922 (1980). In *Ethical Culture*, the Appellate Division, First Department and the Court of Appeals upheld the landmark designation of the Society's building on Central Park West, even though such designation prevented the Society from fully developing the economic potential of the property. The Society argued that the existing structure was inadequate for its needs, but did not seriously argue before the Court of Appeals that the very designation was interfering with the eleemosynary activities within the landmarked building. The Court in *Ethical Culture*, in apparent disagreement with the holding in *Lutheran Church*, specifically noted the availability and applicability of the statutory remedies to the Society.

The situation in which the Church of St. Paul and St. Andrew finds itself falls somewhere between that of the Plaintiffs in *Lutheran Church* and *Ethical Culture*. The Church is alleging two distinct forms of hardship which overlap to some extent. The first claim, although the Church attempts to cast it in a different light in the Complaint, is that the Church is now limited in its desire to freely develop the commercial value of the property. This has already been determined in *Ethical Culture* as not constituting the sort of direct interference contemplated by the judicial test. The interference caused by the designation must relate directly to activities already being carried on inside the structure. Here, when applying this limitation without more, the allegations of the Complaint itself bar relief. For it is not the designation which is interfering with the activities being carried on inside the building, but Plaintiff's lack of funds. The interior of the structures have not been landmarked. Most of the congregation's complaints relate to the conditions on the inside of the building; the Complaint demonstrates that these conditions existed before the designation proceeding was commenced and were in fact the reason that the Church decided to develop the property for partial residential use.

However, the Church has also pleaded the existence of facts which would indicate that virtually all of its available funds are being devoured by the cost of maintaining this physical plant, to the detriment of the congregation and its charitable activities. The congregation currently has an obligation to maintain an enormous sanctuary which it cannot use safely in the Winter, for the aesthetic enjoyment of its neighbors. There comes a point where the obligation to preserve even the handsomest structure ceases to be a valid exercise of the police power and becomes a naked taking. *Lutheran Church*, *supra*; see also *Westchester Reform Temple* v. *Brown*, 22 NY2d 488, 293 NYS2d 297, 239 NE2d 897 (1967).

It is clear that there is no inherent right to a declaration under CPLR 3001 and it is equally unclear at the present time whether both the interest of the Church of St. Paul and St. Andrew and the interest of the public may be accommodated. See similarly *Ruckelshaus* v. *Monsanto Company*, 52 USLW 4886 (1984). Accordingly, the Court declines to make a declaration at this time and holds that the grant of any of the relief sought would be premature. The matter not being ripe for adjudication, the Complaint is dismissed. *McKinsey & Co. Inc.* v. *Olympia & York '245 Park Avenue*, 79 AD2d 557, 433 NYS2d 802 (1st Dept. 1980). Such dismissal is without prejudice to maintenance of any appropriate proceedings after the completion of the administrative process. Defendants' counsel has represented to this Court that any submissions made to the Commission for hardship or related relief will be handled expeditiously.

Settle order formally amending the Answer to the Amended Verified Complaint; dismissing the Amended Verified Complaint without prejudice as set forth above; and providing for expedited consideration of any application made by the Church in the administrative forum.

/s/ ROBERT E. WHITE, J.S.C.
Robert E. White

Dated: August 1, 1984

Order and Judgment of the New York Supreme Court filed September 17, 1984

At a Trial Term, Part XIV of the Supreme Court of the State of New York, held in and for the County of New York on the 5th day of September, 1984.

Index No. 6781/82

Cal. No. E22358

Present:

HON. ROBERT E. WHITE,

Justice.

CHURCH OF ST. PAUL AND ST. ANDREW,

Plaintiff,

—against—

KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, AND ELLIOTT WILLENSKY, CONSTITUTING THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK; EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW J. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD R. MANES, AND ANTHONY R. GAETA, CONSTITUTING THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK; AND THE CITY OF NEW YORK,

Defendants.

PROPOSED ORDER/JUDGMENT

The defendants, KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, and ELLIOTT WILLENSKY, constituting the LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW J. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD R. MANES, ANTHONY GAETA, constituting THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK, by their attorney FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, having moved pursuant to CPLR § 3212 for summary judgment dismissing the complaint in the above-captioned action, and said motion having come on to be heard for oral argument before this Court on July 18, 1984,

NOW, upon reading and filing the notice of motion for summary judgment dated May 10, 1984, the affirmation of Susan R. Rosenberg dated May 10, 1984, and the exhibits annexed thereto, the affidavit of Gene A. Norman sworn to May 10, 1984, and the exhibits annexed thereto, the affidavit of Joseph Wasserman sworn to May 10, 1984, and the exhibits annexed thereto, the affidavit of Peter Samton sworn to May 9, 1984, the affidavit of Frank Patton, Jr., in opposition to the motion for summary judgment sworn to June 22, 1984, and the exhibits annexed thereto, the affidavit of G. Morris Gurley in opposition to the motion for summary judgment sworn to June 21, 1984, the affidavit of Rev. Robert E. Richmond in opposition to the motion for summary judgment, sworn to June 18, 1984, the affidavit of Rev. Floyd George, III in opposition to the motion for summary judgment sworn to June 19, 1984, and the reply affirmation of Susan R. Rosenberg dated July 3, 1984, and the defendants having appeared by Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York (Susan R. Rosenberg, Esq., of counsel), and

the plaintiff having appeared by Ellis, Stringfellow, Patton & Leibovitz (Frank Patton, Jr., Esq., of counsel) and after due deliberation having been had thereon and upon the written decision of this Court dated August 1, 1984,

NOW, upon motion of Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York (Susan R. Rosenberg, Esq., of counsel), attorney for defendants, it is

ORDERED AND ADJUDGED, that defendants' verified amended answer to the verified amended complaint is formally amended to the extent of withdrawing their first defense that plaintiff failed to exhaust its administrative remedies and substituting as a first defense that the action is not ripe for judicial review and remedy; and it is further

ORDERED AND ADJUDGED, that the defendants' motion for summary judgment is granted and that the verified amended complaint is hereby dismissed without prejudice to the maintenance of any appropriate proceedings after the completion of the administrative process; and it is further

ORDERED AND ADJUDGED that defendant Landmarks Preservation Commission shall provide for expedited consideration of any application made by plaintiff in the administrative forum.

ENTER:

/s/ ROBERT E. WHITE, J.S.C.
Robert E. White

/s/ NORMAN GOODMAN
Norman Goodman

9/5/84
Filed
Sep 17 1984
County Clerk's Office
New York

Order and Judgment of the New York Court of Appeals dated June 5, 1986

COURT OF APPEALS
STATE OF NEW YORK

Index No. 6871/82

THE HON. SOL WACHTLER, *Chief Judge, Presiding*

No. 47

CHURCH OF ST. PAUL AND ST. ANDREW,

Appellant,

—v.—

KENT L. BARWICK, *et al.*,

Respondents.

The appellant in the above entitled appeal appeared by Ellis, Stringfellow, Patton & Leibovitz, Esqs.; the respondents appeared by Hon. Frederick A. O. Schwarz, Jr., Corporation Counsel.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Hancock in which Chief Judge Wachtler and Judges Kaye and Titone concur. Judge Meyer dissents and votes to reverse in an opinion in which Judges Simons and Alexander concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, June 5, 1986.

New York City Landmarks Preservation Law

CHAPTER 8-A

PRESERVATION OF LANDMARKS AND HISTORICAL DISTRICTS

§ 205-1.0 Purpose and declaration of public policy.—a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world-wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values

in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-1.0 Definitions.**—As used in this chapter, the following terms shall mean and include:

a. "Alteration". Any of the acts defined as an alteration by the building code of the city.

b. "Appropriate protective interest". Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.

c. "Capable of earning a reasonable return". Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.

d. "City-aided project". Any physical betterment of real property, which:

(1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or other mode of financial assistance, exercise of the city's powers of eminent domain, contribution of city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission". The landmarks preservation commission.

f. "Day". Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 207-16.0 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes; provided however, that the term "improvement parcel" said* also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as an interior landmark pursuant to the provisions of this chapter.

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.

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* So in original. Should probably be "shall".

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials comprising an improvement including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 207-18.0 of this chapter the surfacing, resurfacing, painting, renovating, restoring, or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

(1) work done on any improvement; or

(2) replacement of any part of an improvement; for which a permit issued by the department of buildings is not required by law, where the purpose and effect of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally

entitled upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 207-8.0 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel, or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the City, which is in effect at the time of the filing of the request for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as the result of a transaction at

arms' length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing; and

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of

two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 207-8.0 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ 207-2.0 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts.— a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate and, as herein provided in subdivision j, in order to effectuate the purposes of this chapter to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to a list of scenic landmarks, located on property owned by the city, which are identified by a description setting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and, in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 207-17.0. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision.

e. Subject to the provisions of subdivisions g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions

county of Richmond, a notice of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers, and its tax map, block and lot number or numbers, and in the case of all other counties, by its land map block and lot number or numbers. (Amended by L. L. 1977, No. 54, July 28, 1977, eff. Jan. 1, 1977.)

§ 207-3.0 Scope of commission's powers.—a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement, or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use. (Subd. b amended by L. L. 1973, No. 71, Dec. 17.)

§ 207-4.0 Regulation of construction, reconstruction, alterations and demolition.—a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic

district of any part of an improvement containing an interior landmark, to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause or permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision a of section 207-17.0 of this chapter, or to any city-aided project, or in cases subject to the provisions of section 207-11.0 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 207-17.0 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certifi-

a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the health services administration.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to the board of estimate a report with respect to the relation of such designation or amendment thereof to the zoning resolution, projected public improvements and any plans for the development, growth, improvement or renewal of the area involved.

(2) The board of estimate may modify or disapprove such designation or amendment thereof within ninety days after a copy thereof is filed with the secretary of the board provided that the planning commission has submitted the report required by this subdivision or that thirty days have elapsed since the referral of the designation or amendment to the commission by the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the

board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to the board of estimate a report with respect to the relation of such proposed rescission to the zoning resolution, projected public improvements and any plans for the development, growth, improvement, or renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the resolution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to subdivision a shall be made pursuant to notices of public hearings given, as provided in section 207-12.0.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic district or any amendment of any such designation or rescission thereof, the commission shall cause to be recorded in the office of the register of the city of New York in the county in which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the borough and county of Richmond in the office of the clerk of said

cate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The applicant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application, or amended application every such applicant shall file with the commission, a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-5.0 Determination of request for certificate of no effect on protected architectural features.**—a. (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or

containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files, a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done, and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certificate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten-day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application. (Amended by L. L. 1973, No. 71, Dec. 17.)

applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) the owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) the improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes; and

(d) the prospective purchasers or tenant:

(1) in the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making

a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1) preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant

§ 207-6.0 Factors governings issuance of certificate of appropriateness.—a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 207-5.0 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 207-8.0 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 207-3.0 of this chapter and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of

buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 207-3.0 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or construction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the commission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features, together with such effects, and the exterior architectural features of the landmark, and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior

architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-7.0 Procedure for determination of request for certificate of appropriateness.**—The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 207-8.0 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

§ **207-8.0 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return.**—a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of

such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom; the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 207-6.0 of this chapter, shall, within ninety days after the filing of the request for such certificate of appropriateness, makes a preliminary determination of insufficient return. (Subd. a, par. 1 amended by L. L. 1973, No. 71, Dec. 17.)

(2) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or sections 458, 460 or 479 of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to Sections 420, 422, 424, 425, 426, 427, 428, 430, 432, 434, 436, 438, 440, 442, 444, 450, 452, 462, 464, 468, 470, 472 or 474 of the real property tax law and the

to the provisions of paragraph five for this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing fiscal year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this

section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefited by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejection filed with the commission. If such an acceptance is filed, the commission shall deny the request of such applicant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c, and d of this section within the period of time prescribed by such subdivision d; or

(b) the commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) a plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commission may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant issue and foreward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time

prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a purchaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one-hundred eighty-day period following the commissions' preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one-hundred-eighty-day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation, is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona-fide assignee, successor, lessee or sub-lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ 207-9.0 Regulation of minor work.—a. (1) Except as otherwise provided in section 207-11.0 of this chapter, it shall be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work.

(2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as is practicable, certify to the commission whether a permit for such

proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application as hereinafter provided.

c. (1) The commission shall determine:

(a) whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an historic district or interior architectural feature of an improvement containing an interior landmark; or

(b) If such work would have such effect, whether judged by the standards set forth in subdivision b, c, d and e of section 207-6.0 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision e in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forh in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as prescribed in subparagraph two of subdivision a of section 207-5.0 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 207-17.0 of

this chapter and to any city-aided project. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ 207-10.0 Maintenance and repair of improvements.—a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ 207-11.0 Remedying of dangerous conditions.—a. In any case where the department of buildings, the fire department or the health service administration, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

§ 207-17.0 Reports by commission on plans for proposed projects.—a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark; shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within 45 days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a city-aided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the com-

mission a report on such plans proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within 45 days after such referral.

c. Except as provided in subdivision d of section 207-2.0, where the commission so requests, plans for the construction, reconstruction* alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within 45 days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to conform with applicable laws concerning regulation of lots, storm water disposal and water courses. The administrator of the parks, recreation and cultural affairs administration may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-18.0 Regulations.**—The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including, but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic

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* So in original.

landmarks and historic districts, subject to the provisions of § 207-3.0 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions of an historic district and may vary from area to area in their provisions. (Subd. a amended by L. L. 1973, No. 71, Dec. 17.)

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 207-8.0 of this chapter; and

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter, including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ **207-19.0 Investigations and reports.**—The commission may make such investigations and studies of matters relating to the protections, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks and scenic landmarks as the commission may from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-20.0 Applicability.**—a. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in a historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature

of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation or amended or modified designation pursuant to the provisions of section 207-2.0 of this chapter, first making the provisions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-21.0 Separability.**—If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby. (Added by L. L. 1965, No. 46, April 19.)

constructed as making it unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction. (Subd. a amended by L. L. 1973, No. 71, Dec. 17.)

b. The department of buildings, fire department or department of health, as the case may be, shall give the commission as early notice as is practicable, of the proposed issuance or issuance of any such order or direction.

§ **207-12.0 Public hearings; conferences.**—a. The commission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof on the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or their last known address or addresses, as the same appear in the records of the office of the city director of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notice shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property. (Subd. a amended by L. L. 1973, No. 71, Dec. 17.)

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence, provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 207-5.0 and 207-9.0 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the improvement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the city director of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 207-13.0 Extension of time for action by commission.— Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor

work, the applicant may extend such period of time by his written consent filed with the commission. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ 207-14.0 Determinations of the commission; notice thereof.—a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination and of any preliminary determination of insufficient return made pursuant to paragraph (1) of subdivision a of section 207-8.0 of this chapter to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 207-3.0 of this chapter, any determination of the commission granting a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivision g of section 207-8.0 of this chapter. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ 207-15.0 Transmission of certificates and applications to proper city agency.—In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to

article seven of the zoning resolution, the commission shall transmit such certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be. (Amended by L. L. 1973, No. 71, Dec. 17.)

§ **207-16.0 Penalties for violations; enforcement.**—a. Any person who violates any provision of subdivision a of section 207-4.0 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 207-9.0 of this chapter or any provision of section 207-10.0 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty-five dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any preson who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, wilfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 207-4.0 of this chapter or paragraph two of subdivision a of section 207-9.0 of this chapter or any violation of the provisions of section 207-10.0 of this chapter, shall constitute a separate violation of such provisions.

Amended Verified Complaint

NEW YORK SUPREME COURT
COUNTY OF NEW YORK

Index no. 6781/82

CHURCH OF ST. PAUL AND ST. ANDREW,

Plaintiff,

—against—

KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, AND ELLIOTT WILLENSKY, CONSTITUTING THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK; EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW J. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD R. MANES, AND ANTHONY R. GAETA, CONSTITUTING THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK; AND THE CITY OF NEW YORK,

Defendants.

For its complaint herein, plaintiff by its attorneys Ellis, Stringfellow, Patton & Leibovitz, alleges as follows:

First Cause of Action

1. This is an action for a declaratory judgment, injunction, and award of damages pursuant to Title 42, United States Code, Section 1983, and Section 3001 of the New York Civil Practice Law and Rules. Plaintiff also seeks attorney's fees pursuant to Title 42, United States Code, Section 1988. This action is brought to redress the deprivation by defendants

acting under color of state law, statute, ordinance, regulation, custom or usage, of plaintiff's rights, privileges and immunities secured by the United States Constitution and laws, and by the Constitution and laws of the State of New York, which guarantee to plaintiff the right of free exercise of religion, due process and equal protection of the laws.

2. Plaintiff is a United Methodist church, and is a New York religious corporation formed by the consolidation in 1937, under Section 13 of the New York Religious Corporations Law, of St. Paul's Methodist Episcopal Church and St. Andrew's Methodist Episcopal Church. Plaintiff's office and church building are located at the corner of West 86th Street and West End Avenue, City, County and State of New York.

3. On information and belief the eleven individual defendants named in the caption of this action as constituting the members of the Landmarks Preservation Commission comprise all the members of the Landmarks Preservation Commission, a commission within the Department of Parks and Recreation of the City of New York, appointed by the Mayor of the City of New York pursuant to the New York City Charter. The eight individual defendants named in the caption of this action as constituting the members of the Board of Estimate comprise all of the members of the Board of Estimate, a board of the City of New York having powers and duties specified by the New York City Charter. Defendant New York City is a municipal corporation. All aforesaid individual defendants are sued in their official capacity, in that their actions as alleged herein represent the official policy and custom of defendant New York City.

4. The Landmarks Preservation Commission (hereinafter the "Commission") exercises the powers and duties specified in the New York City Charter and in the Administrative Code of the City of New York, with respect to the establishment and regulation of landmarks and related matters. These powers include authority, under Chapter 8-A of the Administrative Code, to designate buildings as landmarks, to regulate the

alteration, reconstruction, or demolition of landmarked buildings, and to regulate construction on a landmark site. Under said chapter of the Administrative Code, the Board of Estimate may, within a specified period, modify or revoke any landmark designation of the Commission. Chapter 8-A of the Administrative Code is sometimes hereinafter referred to as the "Landmarks Law."

5. Plaintiff's church building is the house of worship for plaintiff's church congregation, and also contains meeting rooms and offices where plaintiff conducts its religious mission programs and church-related charitable programs. Plaintiff's purposes and activities are exclusively religious and charitable, and plaintiff's church property is exempt from real estate taxes under Section 420-a of the New York Real Property Tax Law.

6. Plaintiff's church building is, and for a number of years has been, severely decayed and deteriorating. Because of mounting maintenance and repair costs, the diversion of plaintiff's available funds into large expenditures for maintenance and repair, and the fact that the plaintiff's church building was increasingly inefficient and unsuitable for plaintiff's church program, all of which would lead to exhaustion of funds and bankruptcy, plaintiff began, in recent years, prior to the landmark designation herein, to consult with various building developers to endeavor to arrange for reconstruction of its church building, to provide a new building with appropriate facilities and income for plaintiff's continuing religious and charitable program, thereby assuring its survival. Prior to November 24, 1981, plaintiff was close to completing such arrangements.

7. With knowledge of plaintiff's intentions and for the purpose of preventing such reconstruction, on November 24, 1981 the Commission designated plaintiff's church (Tax Map Block 1234, Lot 1) a landmark, over objections by plaintiff. Attached as Exhibit A is a copy of letter of December 2, 1981 from the Commission to plaintiff advising of such designation. On March 18, 1982 the Board of Estimate approved said

designation. Under the Landmarks Law, as a result of said designation plaintiff is now prevented from altering or reconstructing its church building without permission of the Commission and is subject to the maintenance and repair obligations and other requirements set forth below.

8. The landmark designation of plaintiff's church financially and physically prevents or seriously interferes with the carrying out of plaintiff's religious and charitable purposes, as follows:

(a) Sec. 207-10.0 of the Administrative Code provides that

> "Every person in charge of an improvement on a landmark site . . . shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair."

Under Sec. 207-16.0 (b) of the Administrative Code, any person who violates the foregoing provision

> "shall be punished as a first offense, by a fine of not more than two hundred fifty dollars or less than twenty five dollars or by imprisonment for not more than thirty days, or both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment."

(b) As a result of landmark designation of plaintiff's church, plaintiff is now subject to the foregoing building maintenance requirements and to the above penalties for failure to maintain. The Landmarks Law fails to provide plaintiff with adequate relief or compensation in return for the requirements and burden imposed on plaintiff by the landmark designation.

(c) The cost of immediate exterior repair and maintenance work required for the building, and the cost of immediate interior repair work needed to support the exterior, are currently estimated to aggregate $350,000. Plaintiff does not have these funds. Plaintiff's total assets, apart from the value of its church building and adjoining parsonage, aggregate approximately $50,000.

(d) Despite the efforts of plaintiff to provide from plaintiff's own funds sufficient monies for the maintenance of the church, the continuing cost of maintenance over the past years has been so large that plaintiff has been unable to provide a level of maintenance which would approach the "good repair" requirements of Sec. 207-10.0 of the Landmarks Law. Even if the immediate repair and maintenance requirements of the building were met, plaintiff would be unable to meet the continuing repair and maintenance requirements on an annual basis.

(e) As a result of landmark designation plaintiff is required to spend an amount equal to seven times the total amount of all its funds and securities to meet the repair and maintenance requirements of its church building and comply with the "good repair" requirements of the Landmarks Law, and would therefore be compelled to bankrupt itself and to terminate its religious worship, religious mission and charitable programs as a result of landmark designation. Plaintiff's resources are insufficient to maintain its church as a landmark.

(f) Apart from Landmarks Law repair and maintenace requirements, the decayed and deteriorated condition of plaintiff's church would force plaintiff, if plaintiff were required to retain its church building, to continue hereafter to divert all its funds to church building repair and maintenance.

(g) Landmarking of plaintiff's church physically prevents plaintiff's carrying out its religious purposes. Plaintiff requires a reconstructed building in order to carry out its religious purposes, and plaintiff's building is unsuited and inappropriate

for plaintiff's religious mission and charitable purposes. Plaintiff's building is inefficient to heat and operate, does not contain facilities which are required by plaintiff's present congregational needs, and contains unuseable, impractical, decayed and deteriorated physical arrangements which presently interfere with the carrying out of plaintiff's religious and charitable purposes.

(h) For the foregoing reasons, the landmarking of plaintiff's church prevents reconstruction of the church and thereby financially and physically prevents or seriously interferes with plaintiff's carrying out its religious and charitable purposes.

9. The actions of defendants herein implement and execute the official policy and governmental custom of the City of New York and each additional defendant in deprivation of plaintiff's constitutionally protected rights, contrary to Title 42, Unites States Code, Section 1983.

10. The Landmarks Law and landmark designation as applied to plaintiff deprive plaintiff of the free exercise of religion in violation of the First Amendment of the United States Constitution and Article I, Section 3 of the New York Constitution.

11. Plaintiff has no adequate remedy at law.

Second Cause of Action

12. Plaintiff realleges paragraphs 1 through 9 and 11 hereof.

13. The Landmarks Law and landmark designation as applied to plaintiff deprive plaintiff of due process of law and violate the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 6 and 7 of the New York Constitution by taking plaintiff's private property for public use without just compensation.

Third Cause of Action

14. Plaintiff realleges paragraphs 1 through 9 and 11 hereof.

15. During the period the Commission was considering whether to designate plaintiff's church a landmark, plaintiff submitted substantial materials, in writing and at a public hearing, demonstrating to the Commission that landmark designation of plaintiff's church would physically and financially prevent or seriously interfere with plaintiff's carrying out its religious and charitable purposes, in deprivation of plaintiff's constitutionally protected rights.

16. The Commission failed and refused to consider the foregoing materials submitted in support of plaintiff's constitutional claims, and made no finding as to the effect of landmark designation on the ability of plaintiff to carry out its religious and charitable purposes. The Commission claimed instead to be limited by the Landmarks Law to consideration only of the special character or special historical or aesthetic interest or value of plaintiff's church as part of the development, heritage or cultural characteristics of New York City.

17. Following the landmark designation of plaintiff's church, the Board of Estimate held a public hearing on said designation. At, prior to and following such hearing plaintiff submitted statements and written materials to the members of the Board of Estimate demonstrating that landmark designation would physically and financially prevent or seriously interfere with the ability of plaintiff to carry out its religious and charitable purposes, in conflict with plaintiff's constitutionally guaranteed rights. The Board of Estimate declined to consider such statements and materials in support of plaintiff's constitutional claims, and declined and failed to make any finding or determination as to the physical or financial effect of such designation on plaintiff's church. On March 18, 1982 the Board of Estimate approved the landmark designation.

18. The failure of the Commission and Board of Estimate to consider plaintiff's consitutional claims cannot be remedied by so-called ameliorative provisions of the Landmarks Law, including provisions allowing the Commission to grant permission for demolition, alteration or reconstruction of

landmarked premises under certain circumstances. Said so-called ameliorative provisions are inapplicable and without benefit to plaintiff, do not address plaintiff's constitutional claims herein, and will prejudicially entangle plaintiff in complex, time-consuming and costly procedures of the Commission without any reasonable expectation of relief.

19. The failure of the Commission and Board of Estimate to consider plaintiff's constitutional claims as to the landmark designation, and the aforesaid provisions of the Landmarks Law as applied to plaintiff, deprive plaintiff of due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 6 and 11 of the New York Constitution, and deny plaintiff's right of free exercise of religion in violation of the First Amendment of the United States Constitution and Article I, Section 3 of the New York Constitution.

Fourth Cause of Action

20. Plaintiff realleges paragraphs 1 through 9, 11, and 15 through 18 hereof.

21. As a result of the foregoing designation of plaintiff's church as a landmark and the unlawful taking of plaintiff's property, plaintiff has suffered and will suffer substantial damages in being required under the Landmarks Law to sustain the burden of maintaining and repairing plaintiff's church building, which is decayed, deteriorated, obsolete and inadequate for plaintiff's religious and charitable purposes, and by being required to spend large sums for attorney's fees and other costs to endeavor to protect its minister, trustees, and personnel from liabilities arising from the deteriorated condition of its building and the repair and maintenance requirements of the Landmarks Law, by being deprived of the opportunity to reconstruct its building in order to eliminate the foregoing expenses and in order to obtain facilities and income for the carrying out of plaintiff's religious and charitable purposes, all of the foregoing damages aggregating thirty million dollars ($30,000,00).

Affidavit of G. Morris Gurley, Sworn to June 21, 1984— In Opposition To Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 6781/1982

CHURCH OF ST. PAUL AND ST. ANDREW,
Plaintiff,

—against—

KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONDSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, AND ELLIOTT WILLENSKY, CONSTITUTING THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK; EDWARD I. KOCH, ANDREW J. STEIN, CAROL BELLAMY, DONALD R. MANES, AND ANTHONY R. GAETA, CONSTITUTING THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK; AND THE CITY OF NEW YORK,
Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK: ss:

G. MORRIS GURLEY, being duly sworn, deposes and says:

1. I reside at 263 West End Avenue, New York, New York, and I make this affidavit in opposition to the defendants' motion for summary judgment.

2. I have been a member of plaintiff Church of St. Paul and St. Andrew (herein the "Church") since 1974. I am the Chairman of the Board of Trustees of the Church. I am fully familiar with the issues and circumstances of this case.

3. The Board of Trustees is charged with the management of the physical assets of the Church, including its real property. I have also been named by the Board of Trustees of the Church to meet, along with the ministers of our Church, prospective builders and architects to try to work out arrangements for the reconstruction of the Church, and to carry out the rebuilding plans and goals developed within the Church.

4. As set forth below in this affidavit, and as will be testified to in detail at the trial of this action:

(i) The Church has virtually used up all its financial assets in attempting to maintain its present building.

(ii) Continued maintenance of the Church's building would bankrupt the Church and would force our congregation to give up its buildings.

(iii) Over the past ten year period and up to the point of being designated a landmark, the Church has been making strenuous and consistent good faith efforts to arrange for the redevelopment of its property in order to save the congregation from bankruptcy and to give it a secure future.

(iv) The Church fully informed the Commission during the Commission's pre-designation proceedings of the Church's physical and financial circumstances and that the designation would be unconstitutional under the *Lutheran Church in America* case cited and discussed in plaintiff's memorandum of law, since it would prevent the Church's carrying out its religious and charitable purposes.

(v) Prior to the Board of Estimate's vote on confirmation of the Church's designation, the Church fully in-

WHEREFORE, plaintiff requests judgment of this Court as follows:

1. Declaring that defendants' designation of plaintiff's church as a landmark is unconstitutional, void and ineffective.

2. Declaring that the Landmarks Law as applied to plaintiff is unconstitutional, void and ineffective.

3. Declaring that defendants the City of New York, the Landmarks Preservation Commission, the Board of Estimate, and their members, officials, employees and agents are enjoined and restrained from taking any action to enforce landmark designation or the Landmarks Law against plaintiff's church, and directing defendants to remove such designation from all official records.

4. Declaring that the plaintiff may recover from the defendants the sum of thirty million dollars ($30,000,000) as damages.

5. Awarding to the plaintiff reasonable attorney's fees pursuant to Title 42, United States Code, Section 1988.

6. Awarding to plaintiff the costs and disbursements of this action and such further relief as the Court may deem just and proper.

ELLIS, STRINGFELLOW, PATTON & LEIBOVITZ
Attorneys for Plaintiff
51 East 42nd Street
New York, New York 10017
Tel. 212-867-0180

VERIFICATION

STATE OF NEW YORK
COUNTY OF NEW YORK: ss.:

SYLVIA M. BARKER, being duly sworn, deposes and says:

I am the Chairman of the Administrative Board of the Church of St. Paul and St. Andrew, the plaintiff in the above entitled action, which is a corporation created under and by virtue of the laws of the State of New York. As such Chairman of the Administrative Board, I am an officer of said corporation. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge except as to the matters stated therein to be alleged on information and belief, and as to such matters I believe it to be true.

/s/ SYLVIA M. BARKER
Sylvia M. Barker

Sworn to before me this
23rd day of June, 1982.

FRANK PATTON JR.
Frank Patton Jr.
Notary Public, State of New York
No. 31-3036210
Qualified in New York County
Commission Expires March 30, 1983

EXHIBIT A

Letter Dated December 2, 1981
Annexed to Amended Verified Complaint

LANDMARKS PRESERVATION COMMISSION
20 Vesey Street, New York, New York 10007
566-7577

December 2, 1981

Floyd E. George III, Pastor
The Church of St. Paul & St. Andrew
West End Avenue at 86th Street
New York, New York 10024

Re: Church of St. Paul & St. Andrew,
540 West End Avenue, Manhattan,
Tax Map Block 1234, Lot 1.

Dear Reverend George:

On November 24, 1981, the Landmarks Preservation Commission designated the Church of St. Paul & St. Andrew an official New York City Landmark. Enclosed is one copy of the designation report covering this landmark.

Any designation made by the Commission is in full force and effect from the date of adoption by the Commission. The Board of Estimate may approve, disapprove or modify such designation within ninety days of receipt of the designation report from the Commission. Referral to the Board of Estimate must be within five working days after designation.

In recent years, more and more people have become aware of the importance of designating and saving New York City's fine buildings. It is especially significant for us to add the Church of St. Paul & St. Andrew to the distinguished list of designated landmarks and the Commission looks forward to working with

you in the future. We believe that the architectural specialists at the Commission can be of help when matters arise in connection with your building.

Sincerely,

Lenore Norman
Executive Director

IN:MC:hoh
Enclosure (1)

cc: Frank Patton, Jr. Esq.

formed the Board of Estimate of the physical and financial condition of the Church and that the designation of the Church was unconstitutional under the above stated principle.

(vi) Despite the urgings of the Church, both the Commission and the Board of Estimate refused to consider the financial and physical condition of the Church. The Commission insisted that it would recognize that constitutional issue only in post-designation proceedings and only if the Church would initiate a statutory "hardship" proceeding under the landmarks law.

(vii) The Church carefully considered the Commission's statutory hardship proceeding and for the reasons stated below concluded it was inapplicable, undefined, and highly prejudicial to the Church.

(viii) Because of the Commission's and the Board of Estimate's refusal to consider the *Lutheran Church in America* principle prior to designation and confirmation of the designation, the Church had no choice but to bring this lawsuit to annul the designation on the constitutional grounds stated in the accompanying memorandum of law.

Financial condition of the Church.

5. The Church has no assets other than its present small endowment of about $35,000, its land at the corner of 86th Street and West End Avenue, Manhattan, and the sanctuary, parish house and parsonage on that land. From its membership of approximately 200 to 250 the Church receives total annual pledge income and donations of about $60,000. The Church receives some contributions from participating organizations toward their share of the costs of the building. Even with this help we can barely meet the most necessary of expenses. We have cut badly needed staff substantially in an effort to contain expenses and avoid bankruptcy.

Deteriorated building, and cost of repairs.

7. We have also delayed and suspended every item of repair and maintenance that could be held off. Absolutely necessary repairs include major roof repairs and renovations and massive work on the exterior to prevent huge pieces of masonry and stones from falling off. Stones and masonry have in fact fallen a number of times, presenting a substantial danger to people walking by and in and out of the building. Repairs to the interior of the sanctuary and building will be enormous. For many years the Church has had to keep the balcony of the sanctuary closed because of its deteriorated and dangerous condition. The original Sunday School rooms have had to be closed because they were too dangerous to use. The facade of our building is limestone, which has disintegrated in many places. The roof drainage system is routed through interior drains in the walls, which leak and have rotted out sections of the walls.

8. Our $35,000 endowment cannot even make a dent in the enormous pending repair and maintenance costs which face us. We cannot even consider undertaking the $500,000 of major repairs and renovations.

9. But many escalating costs cannot be delayed or suspended. These include the enormous cost of heating the Church, especially the over-large sanctuary. In 1974 the Church's total heating bill was $11,400. This cost increases every year. In 1979 it had increased to $22,500 (approximately 100% increase). In 1982 it had increased to $34,000 (a 200% increase), which was approximately 57% of the entire pledges and donations of the congregation for that year. Insurance on the antiquated building has doubled and is now in excess of $9,000 per year. Add the approximately $3000 emergency repairs in 1982, and these three items total 70% of all pledges, donations, and loans by members of the congregation. These escalating costs have forced the Church members to increase tremendously their giving by approximately 55% since 1974. It has also forced the Church to expend larger amounts of time

trying to gain income from bazaars, films, etc. rather than concentrating on the Church's own programs. If, indeed, the Church did only a small part of the necessary repairs and renovations, it would completely wipe out all pledges and all other income, leaving nothing for the Church's programs, ministers salaries, custodians, etc.

10. The physical configuration of the Church is extraordinarily inefficient, both in terms of use of the space and also in terms of heating costs. Although our religious services are the center of our activities, we do not hold our religious services in the sanctuary in the winter months, because the space is so much bigger than we need and because the heating costs are prohibitive.

11. The actions of the Landmarks Preservation Commission in designating us a landmark and the actions of the Board of Estimate in confirming that designation have cost us a great deal of money. Further below I have described the steps we took to try to persuade the Commission and the Board of Estimate to consider our constitutional objections immediately and avoid the need for us to sue. With respect to our legal costs, we originally were represented by pro bono legal counsel, soon after we were notified in January 1980 we were being considered for landmark designation. However, the amount of legal work, the intensity of that work, and the refusal of the Commission to recognize our constitutional challenge convinced us that we needed formally to retain legal counsel. We did so at the end of 1980, retaining our present counsel. To the extent of our ability we have paid that counsel toward their legal fees. We have cut into our endowment to make such payments and we have received unusually large and generous contributions made at great sacrifice from members of our congregation. We have also received emergency grants from the General Council on Finance and Administration of the United Methodist Church and from the New York Area Conference of the United Methodist Church to help us cover as much of our legal costs as possible, which has helped to keep

us afloat financially during the period of this litigation. Without all of those added funds, we would have gone into bankruptcy and lost our Church.

Continued maintenance of the buildings would bankrupt us and force us to give up our Church.

12. The foregoing makes it plain that there is no way that our congregation can financially continue to maintain and operate our buildings. We have a perfectly viable and extremely vital congregation. Our congregation is a strong part of our community. However, we simply do not have the $500,000 which we would need to renovate our building. We cannot even repair the building on a day to day basis. Our few remaining funds would be wiped out if we are confronted with any sudden major repair which we can no longer delay. At the trial we will provide financial projections which will graphically demonstrate our insolvency, but the fact of a $35,000 endowment against $500,000 in pending repairs and renovations does not require graphs or charts to underline our impossible financial situation.

Over the past almost 10 year period the Church has been making strenuous efforts to arrange for rebuilding of its buildings in order to save the congregation.

13. The affidavit of Rev. Robert Richmond describes the efforts of our Church to confront, since 1975, the major financial and physical obstacles presented by our buildings. Those efforts included the formation of a Committee on Future Alternatives in 1975, and, in due course, a decision by the Church to proceed to develop potential plans to reconstruct the building. Our plans and studies even included a demographic study of the neighborhood, interviews with other churches to compare alternatives, and consideration of many types of reconstruction and development possibilities. Our consideration of building alternatives required consultation with the New York Area Conference of the United Methodist

Church, since the United Methodist Church has a reversionary interest in our property if we cease using it for church purposes. The procedures we undertook for responsible consideration of alternatives were time consuming, laborious, and detailed. Since we are a church, no single individual could simply decide that we would rebuild; our internal processes required full analysis and consideration by the congregation. In addition, as laymen we did all of this work and planning on our own time and at our own expense, both representing considerable amounts.

14. Our consistent goal was to remain at our congregational site. We never considered selling our building and re-locating our congregation. All plans and proposals which we considered specified that our Church would remain at its present site. Our rebuilding goals included the elimination of the huge, uncontrollable repair and maintenance expenses which we presently face, the creation of an efficient new church premises on our own site with proper spaces for our many religious and charitable outreach activities, maintenance costs which had some rational connection with the space we would occupy, and an income from the property which would give us financial continuity for the future life of our congregation. It was never our aim to produce the largest possible income from our site but sensibly to utilize our assets to save our congregation from extinction. We never viewed income production as a secular activity but as appropriate economic planning for our Church's future—a planning process we call stewardship.

15. Beginning in 1978 I and other church representatives began meeting with architects, builders and developers, to begin creating a plan for the reconstruction of the building. In August 1978 we hired a real estate consultant to help us in our planning and in locating appropriate architects and developers. All of our considerations of building alternatives were made in total good faith, for the sole purpose of saving our congregation. Our consideration of building alternatives long *preceded* any interest by the Commission in our building. As stated at

the deposition of Commission Chairman Kent Barwick the Commission's interest began for the first time during June 1979.

16. By the time the Commission notified us that it was considering us for landmark designation our contacts with builders and developers had advanced considerably. We attempted to continue our work and planning, but the complete uncertainty, suddenly visited upon our deliberations by the Commission's notice that we were being considered for designation, placed a serious cloud over all our negotiations.

17. Hence, the fact of landmark consideration coming at a very critical point in our efforts to develop a plan for a new building seriously interfered with our plans to reach a final arrangement with a builder or developer. Even so, by early November 1981 very shortly before the November 24, 1981 landmark designation by the Commission, we had managed to obtain a formal proposal from the Hemmerdinger Corporation, a reputable developer, which we were seriously considering at the time the Commission landmarked us. We felt that the plan met our needs and objectives. Landmark designation has aborted all our efforts, because as discussed below, we concluded we could not take the serious risks of accepting the Commission's urgings that we enter into the Commission's undefined statutory hardship proceeding.

Prior to landmark designation the Church fully informed the Commission of the Church's physical and financial condition and that landmark designation of the Church would be unconstitutional under the Lutheran Church in America principle.

18. The affidavit of the Commission's present Chairman, Eugene Norman, confirms at page 9 thereof the efforts of the Church to make clear to the Commission the physical and financial condition of the Church:

> ". . . the Church vehemently and vociferously opposed designation, in part on the ground that it would result in

> financial hardship. Indeed, the gravamen of plaintiff's claim seems to be that the Commission acted in an unconstitutional manner in not taking the Church's financial condition into account when it determined that portions of the property met the criteria for designation."

Chairman Norman's affidavit also states at page 6:

> "In opposition to the proposed designation, the Church submitted written statements of the Superintendent, Metropolitan District, United Methodist Church, the Church's Pastor, its counsel, and the Chairman of its Board of Trustees. In addition its counsel submitted a legal memorandum."

19. The materials we submitted to the Commission included a statement of our endowment holdings, our 1980 budget (which included drastic budget cuts), detailed descriptions of the Church including photographs of deteriorated portions of the buildings, descriptions of the physical inadequacies of the buildings in terms of our religious and charitable needs, and financial information to make it plain that the Church was approaching insolvency because of the burden of carrying the building.

20. The Commission has never disputed that in fact the maintenance of the landmark will prevent our carrying on our religious and charitable activities.

21. We fully participated in every stage of the predesignation proceedings. We made written and oral presentations at the public hearings. We could have done nothing more than we did, in order to bring before the Commission, as well as the Board of Estimate, the fact that the designation of our Church as a landmark was unconstitutional. The defendants do not dispute our efforts, and nowhere in their motion papers do they suggest that our proof was insufficient to demonstrate the financial and physical condition of our Church.

After review of the Commission's statutory hardship proceeding the Church concluded it was inapplicable, undefined and highly prejudicial for the Church; and the Church declined to participate in the statutory hardship proceeding.

22. Throughout the pre-designation proceedings, Commission Chairman Kent Barwick and members of the Commission's staff urged that we should wait until the Commission voted to designate us and then apply for relief from designation under the Commission's statutory hardship proceeding. That statutory hardship proceeding is discussed in detail at Point II of the Church's memorandum of law submitted in opposition to the motion for summary judgment.

23. The Chairman told us that the Commission was ready to work with us and to devise various alternatives in solving our building problems. The Commission Chairman and staff, however, insisted that the only stage in the proceedings at which the Commission could consider our financial and physical hardship was during a statutory hardship proceeding after we had been designated a landmark. The Commission Chairman, its executive director Lenore Norman, and its legal counsel Dorothy Miner gave us many reasons why we should regard landmark designation as a benefit rather than as a disadvantage (none of which were applicable to us or helped to address our problems) and many arguments why we should enter the statutory hardship proceedings.

24. We analyzed the Commission's hardship proceeding as stated in the Administrative Code. We were told there were no written rules, regulations or procedures to help guide us in this matter. We concluded that for the following reasons we could not risk entering the hardship proceedings:

a. If applied literally the proceeding would be inapplicable and prejudicial to us, because it specified that we first enter into a contract of sale or lease for our building, that we meet an "insufficient return" financial test, that the Commission had the right to find a new purchaser or lessee for the building, and that ultimately we faced the possibility of condemnation of the Church's building.

when I was appointed to another church. I am fully familiar with the facts of this case. I make this affidavit in opposition to the defendants' motion for summary judgment.

2. The financial circumstances of the Church are fully set forth in the accompanying affidavit of G. Morris Gurley. The decayed and deteriorated condition of the Church's building and its severe space handicaps are fully described in the accompanying affidavit of the Rev. Floyd George, current pastor of the Church.

3. The primary purpose of my affidavit is to inform this court of the efforts of the Church, from 1975 onward, to endeavor to arrange in an orderly way for the reconstruction of the Church, and the efforts of the Church to place before the Commission during the pre-designation procedures the fact that maintenance of the landmark would physically and financially prevent the Church's carrying on its religious and charitable work.

Background.

4. The Church is a congregation of the United Methodist Church, a national Protestant denomination. The Church is thereby subject to the Discipline of the United Methodist Church. That Discipline specifies that the Church's buildings and land revert to the local conference of the United Methodist Church if the Church should cease to exist. The Church's buildings are at the corner of West End Avenue and West 86th Street, in Manhattan. They consist of the house of worship (the sanctuary) and the parish house, which together comprise one building and are the subject of the landmark designation. Adjoining is the Church's parsonage, which though separate is connected to the parish house and sanctuary building. The parsonage was not designated a landmark. The parish house and sanctuary are generally referred to in my affidavit and the accompanying papers as the Church's "building."

5. The Church's building was constructed in or about 1897. It was designed for a far larger congregation than the Church

has. For many years, from the early 1900s until about 1940, the Church regularly filled its 1400 seat sanctuary at Sunday worship services. Both church membership and the size of the worshipping congregation gradually reduced in numbers thereafter. Present membership is about 200-250, and the number of Sunday worshippers is about 100. Originally the Church's activities were primarily the conduct of large weekly worship services, and the conduct of Sunday school and men's and women's religious organizations.

The Church's consideration of reconstruction alternatives.

6. The accompanying affidavit of Rev. Floyd George III shows the enormous change in activities of the Church and the vastly changed space needs. The accompanying affidavit of G. Morris Gurley shows the decline in the Church's resources to a present endowment of about $35,000, the inexorable increase in costs of repair, renovation and maintenance, and the extremely deteriorated condition of the Church's building. These considerations made it imperative that we consider alternatives to our present building if we were to avoid bankruptcy and extinction.

7. As a religious organization and as part of the United Methodist denomination, the Church must follow fairly methodical and systematic procedures which ultimately involve our full membership in considering such a substantial possibility as the reconstruction of our Church's building. In order to follow the most responsible procedures, our Church established in July 1975 a Committee on Future Alternatives charged with commencing the process of considering alternatives for our present building. That Committee met frequently during the balance of 1975 and thereafter. The Committee issued a formal report. We formed three related committees, one to survey the present structure, one to do a demographic study so that we could assess our own needs and prospects and the needs of the surrounding neighborhood, and one to visit other churches to develop comparison information.

b. We were told the Commission claimed the right to employ "creative alternatives" and to bring in outside architects and developers to try to devise alternate plans for us. We could find no statutory authorization for such alternatives, and the Commission had no procedures or guidelines setting forth any such alternatives. We could find no procedural safeguards and no definition to the so-called hardship proceeding.

c. Most important, utilization of the statutory hardship proceeding meant that we would be handing over to the vagaries of the Commission's "creative alternatives" the future of our religious and charitable mission. The Commission's eagerness to intrude into our deliberations made clear that we stood a high risk of losing control of our Church and its future.

d. Because the hardship proceeding presented the spectre of unrestrained administrative takeover of our Church deliberations and planning, and because we had plainly already met the constitutional test expressed by the *Lutheran Church in America* case, we had no alternative but to bring suit to annul the landmark designation.

24. For the reasons stated herein, in the accompanying affidavits and in plaintiff's memorandum of law, the defendants' motion for summary judgment should be denied.

/s/ G. MORRIS GURLEY
G. Morris Gurley

Sworn to before me this
21st day of June, 1984.

FRANK PATTON, JR.

Frank Patton, Jr.
Notary Public, State of New York
No. 31-3036210
Qualified in New York County
Commission Expires March 30, 1985.

Affidavit of Robert E. Richmond, Sworn to June 18, 1984— In Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 6781/1982

CHURCH OF ST. PAUL AND ST. ANDREW,

Plaintiff,

—against—

KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONDSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, AND ELLIOTT WILLENSKY, CONSTITUTING THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK; EDWARD I. KOCH, ANDREW J. STEIN, CAROL BELLAMY, DONALD R. MANES, AND ANTHONY R. GAETA, CONSTITUTING THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK; AND THE CITY OF NEW YORK,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK: ss.:

ROBERT E. RICHMOND, being duly sworn, deposes and says:

1. I am a minister of the United Methodist Church, and I presently reside at 244 Earle Avenue, Lynnbrook, New York. I served as the pastor of plaintiff Church of St. Paul and St. Andrew (herein the "Church") from 1970 until early 1981,

8. By 1978 our procedures had advanced considerably and we found it appropriate to retain Durand Taylor, a real estate consultant, to provide us with professional advice on developing a plan for the reconstruction of the building, a plan which we intended would provide new facilities for our Church, would eliminate the back-breaking financial burden we were facing with the present building, and would also provide us with income to provide responsibly for the future continuity of our congregation. In all our deliberations, however, the question of income was secondary to the essential need to avoid bankruptcy and to obtain facilities which were suited to the current needs and ministry of our Church.

9. All of our congregation's deliberative procedures were enormously time consuming and detailed and represented a huge investment of congregational energy. During my entire ministry at the Church, these extensive deliberations constituted the congregation's most substantial single venture apart from the conduct of our worship services.

10. During 1978 we also began, with Durand Taylor's aid, to talk to architects and developers about rebuilding possibilities. We had a number of meetings in furtherance of our efforts to negotiate and work with architects and developers toward a final plan for the new building.

11. Our first notice from the Commission that we were being considered for possible landmark designation came in January 1980, in a letter from the Commission, which arrived in the midst of our efforts to arrange for rebuilding. The fact of our suddenly being advised that we might be landmarked obviously injected a major uncertainty into our efforts to negotiate seriously with architects and developers. We had no idea what the outcome of the Commission's consideration of our Church would be. As we will show at the trial, our ability to proceed with sensible discussions with architects and developers was thereby significantly impaired.

Our efforts to persuade the Commission to recognize our financial and physical difficulties.

12. Shortly after we were advised we were being considered for designation, we met with representatives of the Commission. We told them about the physical and financial condition of the Church and about our extensive efforts to arrange for rebuilding. Commission Chairman Kent Barwick also called upon me at the Church in April 1980, and I showed him through the Church's building, pointed out areas of decay and deterioration, and indicated the severe space limitations which we faced.

13. We submitted extensive materials to the Commission to demonstrate the financial and physical hardship which made it impossible for us to continue to maintain the building. The Commission was fully informed of our strenuous objections to the designation.

14. However, the primary interest of the Commission Chairman and staff appeared to be to convince us to acquiesce in designation and then to apply for relief under the Commission's statutory hardship proceeding. Other than providing us a copy of the landmarks law, the Commission never gave us any written statements of procedures or rules which explained how the hardship proceeding might work. The Commission Chairman and staff members repeatedly told us that the Commission would not consider our financial condition or the physical condition of the building prior to designation, and then would only consider those matters if we brought a statutory hardship proceeding. For all the reasons outlined in the accompanying papers, we did not wish to enter the Commission's hardship proceeding and run the risk of losing our Church.

15. My ministry at the Church terminated at the end of 1980, when I was appointed pastor of St. James United Methodist Church in Lynnbrook, New York, and where I am presently located. Rev. Floyd George is my successor at the

Church of St. Paul and St. Andrew, and his accompanying affidavit provides further information about the present condition of the Church.

16. For the reasons stated herein, in the accompanying affidavits, and in the accompanying memorandum of law, I urge that the defendants' motion for summary judgment be denied.

/s/ ROBERT E. RICHMOND
Robert E. Richmond

Sworn to before me this
18 day of June, 1984.

/s/ CATHERINE MILLER

CATHERINE MILLER
NOTARY PUBLIC, State of New York
No. 30-4629947
Qualified in Nassau County
Commission Expires March 30, 1986

Affidavit of Floyd George, III, Sworn to June 19, 1984— In Opposition To Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 6781/1982

CHURCH OF ST. PAUL and ST. ANDREW,

Plaintiff,

—against—

KENT L. BARWICK, WILLIAM J. CONKLIN, MARY CHILDS BLACK, R. MICHAEL BROWN, BARBARALEE DIAMONDSTEIN, THOMAS J. EVANS, ARAMINA FERRER, CHARLES A. PLATT, BEVERLY MOSS SPATT, ANTHONY M. TUNG, AND ELLIOTT WILLENSKY, CONSTITUTING THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK; EDWARD I. KOCH, ANDREW J. STEIN, CAROL BELLAMY, DONALD R. MANES, AND ANTHONY R. GAETA, CONSTITUTING THE MEMBERS OF THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK; AND THE CITY OF NEW YORK,

Defendants.

STATE OF NEW YORK
COUNTY OF NEW YORK: ss.:

FLOYD GEORGE, III, being duly sworn, deposes and says:

1. I am the pastor in charge of plaintiff Church of St. Paul and St. Andrew (herein the "Church"). I make this affidavit in opposition to defendants' motion for summary judgment. I have been the pastor of the Church since March 1, 1981. I am fully familiar with the facts of this case.

2. The accompanying affidavit of G. Morris Gurley, Chairman of the Church's Board of Trustees, fully sets forth the present financial condition of the Church and the efforts of the Church to avoid this litigation by attempting to persuade the Commission and Board of Estimate to deal with our constitutional challenge to landmark designation during the pre-designation proceedings.

3. The purpose of my own affidavit is to inform this court as to the wide range of religious and charitable activities which take place in our Church, and the gross unsuitability of that building for such activities. Our Church is eagerly awaiting the moment when we are free to move forward toward our new building.

The Church's building is dangerously deteriorated, and is also poorly structured for our present needs.

4. As a United Methodist congregation, we conduct regular Sunday morning religious services as the primary focus of our regular religious services. Our sanctuary is constructed to seat comfortably at least 1400 people. From early in the 1900s until approaching 1940 the sanctuary was regularly filled at Sunday services. The actual church membership during that period was considerably larger than 1400. From 1940 onward the membership and worshipping congregation gradually declined in numbers. Our present membership is about 200 to 250. Although our membership and worshipping congregation of about 100 is dwarfed by the sanctuary. Even if we experienced startling growth in the future, we cannot remotely anticipate the need for an enormous sanctuary seating 1400 people.

5. We are frequently unable to hold our Sunday services in the sanctuary because of the prohibitive cost of heating the space. Our inability to conduct services in the sanctuary is a severe handicap in the exercise of our religion. Our Church is in desperate need of an appropriate sanctuary which can efficiently be heated. There is no way, in the context of our present building, that we can adequately adapt our present sanctuary to the needs of our congregation.

6. We are severely handicapped, also, by having to close off the balcony of our sanctuary because of the danger from the deteriorated structure. We cannot afford the repairs to the balcony, and we have had to prohibit its use.

7. Similarly, our Sunday School rooms are woefully inadequate, and are pinched into irregular shapes around the upper floor of a high domed interior concert hall of limited utility. We have no funds whatever to renovate these spaces. We entirely lack suitable spaces for flexible religious study meetings, for retreats, and specialized worship services. We plan to have such flexible spaces in our new church building.

8. As we showed to the Commission in pre-designation proceedings, by means of photographs and a written description of the interior of our buildings, the parish house and sanctuary contain many irregular, in some cases triangular, shaped areas sandwiched around the enormous sanctuary. These spaces are almost useless. The Church's office, for example, has been forced into a tiny, irregular space immediately to the left of the side entrance to the Church. It is the only available space, but it is extremely difficult to use. The administrative needs of our Church are expanding as our congregation begins to grow and its activities broaden. Our makeshift office space hampers the development of our Church. Our building seems to be blessed both with enormous open areas which we cannot heat or use, and tiny irregular rooms which are too cramped for our needs.

The Church's religious and charitable outreach programs create new space requirements.

9. At the same time that our building's deterioration has accelerated and our financial situation has become acute, space needs arising from the diverse activities of our congregation have dramatically increased. In addition to the weekly religious services, we conduct a large number of additional religious programs for which adequate spaces are extremely difficult to find within the Church. These programs include seminars on

religious topics of interest to the congregation and the community, programs for Christian young people, Christian Artists Fellowship, various United Methodist Women's Groups, programs of the Congregational Task Force on Human Rights, prayer fellowship gatherings, peer crisis counselling for members of the congregation and the community, a weekly young adult "coffee house" conducted by the Church, theatre programs conducted by the Church, and a number of other groups. The Church also provides a hostel for young United Methodist visitors to New York City. These varied programs are extremely difficult to conduct in our present building because of the lack of suitable moderate size rooms.

10. In recent years our congregation has become increasingly active in providing charitable services to the surrounding community as part of our religious outreach. These outreach programs represent a notable increase in the vitality of the congregation and its concern with its neighborhood. The outreach programs include a Nutrition and Health Center for senior citizens, the West Side Campaign Against Hunger, a program for shut-ins, a food pantry for the poor, Boy Scouts, Cub Scouts, Alcoholics Anonymous, and outreach to former mental patients living in the community.

11. In the earlier days of our Church, such a variety of active charitable ministry programs simply did not exist, and the space requirements of the Church at that time were totally different. Now, because of the far broader range of our religious and charitable activities, we have an acute need for moderate size meeting rooms, for efficient office space, for a suitable auditorium for larger meetings, and for space that can be used flexibly. Those facilities are totally lacking in our present buildings. We expect to have such facilities in our new building.

Building's lack of modern facilities.

12. We of course do not have funds even to consider adding to our building any of the modern facilities which most of us

would take for granted. Our plumbing facilities are decrepit and antique. Lighting is poor and presents particular difficulties because of our long, inefficient hallways, enormous space-consuming interior staircases, and oversized rooms. We have no air conditioning. We have no elevators or stairway inclinators for the elderly and infirm. Indeed, our expanded ministry to the elderly and infirm makes it particularly important that we be able to provide such minimum facilities as for food preparation and food service for our feeding programs. Such modern facilities would enhance our use of our building for both religious and charitable purposes.

The Church faces insolvency.

13. Building decay and deterioration and severe space limitations are only part of the acute overall problem which has forced us to plan for the reconstruction of our building. As Morris Gurley points out in his affidavit, we face bankruptcy because of our enormous pending repair costs and because of the high cost of simply trying to maintain the building from day to day. We do not have the funds to renovate our building; even if we had the capital funds for substantial renovation we have no funds to carry the enormous maintenance costs of a renovated building into the future. We have nothing more than a $35,000 endowment left, and any emergency and unavoidable substantial repair bill will wipe us out.

14. The Commission designated the exterior of our building a landmark just at the time our efforts to arrange for reconstruction were moving toward fruition. Thus the woefully deteriorated and badly configured interior of our building became hostage to the exterior. In order that the Commission can add us to their "list" of landmarks, we are to be forced into retaining a building that for us is a financial and physical disaster. Yet at the same time it is vital that we remain at our congregational site, the site of our religious and outreach ministry. We have no intention of abandoning our place of ministry.

The Church made every effort to persuade the Commission to recognize the Church's constitutional rights during the pre-designation proceedings.

15. We took every step we could conceive of to try to persuade the Commission to acknowledge during the pre-designation proceedings that under the principle established by the *Lutheran Church in America* case cited in our memorandum of law landmark designation of our Church would be unconstitutional because maintenance of the landmark would prevent our carrying on our religious and charitable activities. We did everything possible to avoid the enormous expense of this litigation and to cause the Commission to focus on the constitutional question at the earliest possible time. Even at the eleventh hour, on November 23, 1981, the day preceding the Commission's scheduled vote on our designation, I prepared and had hand delivered to the Commission, with copies for each Commissioner, a letter again describing our situation and urging that the Commission recognize and consider our financial condition and refrain from designating us. A copy of my said letter, undated but delivered Nov. 23, 1981, is attached as Exhibit C to the accompanying affidavit of Frank Patton, Jr.

16. Together with our attorney, I attended the Commission's executive session on November 24, 1981, when the Commission voted to designate us. The public was permitted to attend but not to speak. We are informed that there is no transcript of that meeting. The Commission Chairman, Kent Barwick, stated at that executive session that the Commission had just received a letter from the Church regarding the Church's circumstances, and he urged designation of our building, but stated: "We know the Church is suffering, and it is possible that we will not have this church for long." The Commission's director of research, Marjorie Pearson, then stated to the Commissioners: "If you don't designate the church you won't have it at all." The Commission thereupon voted to designate.

17. I and other Church representatives also attended all meetings of the Board of Estimate at which the question of the Board's approval of the Commission's designation was being

considered. Attached as Exhibit D to the affidavit of Frank Patton, Jr. is a letter on behalf of the Church delivered to Board of Estimate representatives prior to the Board's vote, again asking that the Board of Estimate recognize the Church's constitutional rights under the *Lutheran Church in America* decision cited in our memorandum of law herein. The Board of Estimate ignored the constitutional issue, and confirmed the designation on March 18, 1982.

18. That the Commission and the Board of Estimate should gratuitously totally refuse to recognize our First Amendment rights of free exercise of religion which we responsibly raised during pre-designation proceedings and before the Board of Estimate is entirely without any legal justification, has caused us to incur enormous costs, has blocked our ability to rebuild our Church, and would bankrupt our congregation.

18. For the reasons stated herein and in the accompanying affidavits and memorandum of law, the defendants' motion for summary judgment should be denied.

/s/ FLOYD GEORGE, III
Floyd George, III

Sworn to before me this
19th day of June, 1984.

/s/ FRANK PATTON, JR.
Frank Patton, Jr.
Notary Public, State of New York
No. 31-3036210
Qualified in New York County
Commission Expires March 30, 1985

the religious resources had not been usurped by government for architectural preservation.

In September, 1980, representatives of two small congregations on Manhattan's Upper West Side appealed to the religious leaders of the City. These two congregations had learned that their property was the subject of hearings before the Landmarks Preservation Commission and each recognized the potentially disastrous impact of a landmark designation. The Committee of Religious Leaders, representing officially the Roman Catholic, Protestant, Orthodox and Jewish Communities of the City of New York, appointed this Interfaith Commission to Study the Landmarking of Religious Property. The members of the Interfaith Commission, who are named in Appendix C, include attorneys, an architect, a sociologist, and religious leaders of this City.

This is a crisis of competing values in our society. It is vital for any culture to prevent the erosion of its basic values. The maintenance of a building as a shrine to architecture must not be allowed to drain the congregation of its resources which are needed desperately for its ministries. Said simply: The preservation of bricks and mortar, however attractively arranged by man, can never equal in value the ministry to men and women who have been created by and in the image of God.

It should be noted that this Report in no way seeks to question the legitimate control which government exerts on private owners (whether religious or otherwise) to require them to maintain their properties so as to protect the public safety and health. We strongly object to the forced diversion by government of resources dedicated for religious ministry to serve instead the cause of architectural preservation.

In this Report the Interfaith Commission uses the common term "religious property." Strictly speaking, property is neither religious nor non-religious. By this term we mean to describe that property which is used for religious ministry.

This Interfaith Commission, after extensive work and consultation, has concluded its study and respectfully submits this Report with recommendations to the Committee of Religious Leaders.

II *RELIGIOUS PROPERTY: ASSETS FOR MINISTRY*

The religious community in New York City is one of the City's most valuable assets. The presence of a vibrant Synagogue or Church has always been a major catalyst which renders one area more desirable than another.

Religion, by its very nature, requires meeting places for worship and for educational, cultural, health and other service activities which give expression to the ministry of the Synagogue and Church. At the heart of this conflict between basic social values is the fact that those hurt by the preservation of architectural samples for the benefit of an aesthete elite, are the poor, the weary and the downtrodden who look to the Church and Synagogue for a basic support which governmental agencies cannot effectively give, and often should not give. Drug and alcohol abuse programs, aid to the elderly and to the emotionally, mentally and physically handicapped, religious education and bible studies for children and adults—these are the programs and people who suffer so a very, very few of the more cultivated classes can preserve a prettier view on their block.

The leaders of the religious community in this City are deeply concerned that this ministry is being undermined on a massive scale by a much inferior value-system enforced by governmental interference. The United States Constitution recognizes the necessity for unfettered religious ministry and places two unequivocal prohibitions on the government: 1) that there shall be "no law respecting an establishment of religion," and 2) that there shall be no law "prohibiting the free exercise" of religion.*

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* The First Amendment to the United States Constitution (part of the "Bill of Rights") is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

These restrictions on federal lawmaking were extended to State (and thus to local, municipal) lawmaking by the Fourteenth Amendment to the United States Constitution.

Final Report of the Interfaith Commission to Study the Landmarking of Religious Property

THE COMMITTEE OF RELIGIOUS LEADERS
OF THE CITY OF NEW YORK

January 26, 1982

THE COMMITTEE OF RELIGIOUS LEADERS
OF THE CITY OF NEW YORK

FINAL REPORT OF THE INTERFAITH COMMISSION TO STUDY
THE LANDMARKING OF RELIGIOUS PROPERTY

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The Committee of Religious Leaders of the City of New York met on January 26, 1982, at the New York Board of Rabbis and voted unanimously: 1) to approve this Report, 2) to adopt the Resolution contained herein on pp. 23-26, and 3) to order that both be promulgated.

THE COMMITTEE
OF RELIGIOUS LEADERS
Officially representing Roman Catholic, Protestant, Orthodox and Jewish Communities of the City of New York

INTERFAITH COMMISSION TO STUDY THE LANDMARKING OF RELIGIOUS PROPERTY IN THE CITY OF NEW YORK

STATEMENT OF PRINCIPLES

WE AFFIRM the constitutional principle that no governmental agency may interfere with the free exercise of religion, including interference with the right of a synagogue or church to determine where and under what circumstances it shall worship and exercise its mission and ministries or how it should deploy its resources and assets held for these purposes.

WE AFFIRM the principle that the effective utilization of the property and resources of a religious organization in aid of its worship and its mission and ministry of providing spiritual, emotional and material aid to the people of our City—often to those least able otherwise to obtain it—is a principle of far higher social priority that the otherwise laudable goal of preserving samples of certain distinctive buildings.

WE AFFIRM the principle that the management and utilization of the resources of a synagogue and church, including the maintenance, alteration, demolition or sale of its buildings are responsibilities of the religious congregation or organization and, therefore, should be subject solely to its own discretion in accord with its own policy, recognizing that all such decisions should be undertaken in compliance with appropriate regulations affecting the public safety and health.

— Adopted May 20, 1981

I *PROLOGUE*

We are facing a crisis in our time. Religious ministries which often provide the only significant human as well as spiritual service in local communities are being threatened in the City of New York. This is not the usual threat stemming from the loss of governmental or private grants for social service programs, or even the shifting or demise of individual congregations. It is a threat to religious freedom that has arisen because of a conflict with a worthwhile though lesser goal, namely, the landmarking of distinctive buildings.

In 1966, the New York City Council addressed itself to a desire to help protect the City's architectural heritage by preserving forever samples of distinctive and historic buildings. A landmarks preservation law was enacted. Under this law, once a building is declared a landmark, its owner is forbidden under pain of criminal penalties to alter or demolish his property unless he successfully goes through an uncertain, time-consuming and costly proceeding before the New York City Landmarks Preservation Commission.

While the landmarks preservation law anticipated the need to relieve commercial owners of this freeze on unprofitable structures, the law failed to take adequately into account the needs of the nonprofit owners—religious, educational and

charitable organizations—for which "profit" is measured in terms of human and spiritual service and not in dollars. The law has had a particularly hard impact on the religious community because Churches and Synagogues by their very nature are distinctive in their design.

Buildings which were designed and built to serve well the people at one time are not always able to serve adequately today. Energy conservation has become a major concern as fuel prices approach ten times what they were a decade ago. Shifting needs within the local community require a new and creative response on the part of the religious congregation seeking to minister effectively, whether at the same location or elsewhere. Older buildings, however elegant they may be or have been, sometimes become the impediment to the very ministry they were constructed to promote.

Synagogues and Churches, in seeking to address mounting needs in every local community, have come to find themselves increasingly confronted by the Landmarks Preservation Commission. At best, this has resulted in significant delay and increased the cost of proposed renovation and development programs. At worst, a landmark designation, by retarding or blocking the development of a site, drains off valuable resources which otherwise would be redeployed for more effective ministry. And with the meager resources of most congregations, the expense in time and funds may cause a severe interference with its spiritual and social purposes.

The City's law has, quite unintentionally, created a crisis of so-called "Church/State" proportions. In forcing religious organizations to expend their charitable funds for the maintenance of outmoded and inadequate buildings, the City government is, in fact, directing the Church and Synagogue on how it is to use its resources which have been contributed for its religious ministry, not for architectural preservation. Not only is this a flagrant interference with the free exercise of religion (which is guaranteed by the First Amendment to the Constitution of the United States) but it is a matter of grave concern on behalf of the citizens who will be denied the services which that ministry would otherwise have provided if

A common experience of Churches and Synagogues which have had substantial dealings with the Landmarks Preservation Commission is that the law and the Commission's implementation of it both work an interference with ministry. Some congregations may feel there is a benefit in being designated as a landmark because of the "honor" which the designation implies. In general, so long as there is no need to alter or demolish a building, no "problem" is discerned. When there is need to alter, sell or demolish a building, all kinds of problems occur. At least tens of thousands of dollars which were contributed for religious ministry have, instead, been diverted to coping with unreasonable requirements, delays and capricious directives of the Landmarks Preservation Commission and with the burdens of an inherently defective law.

If an agency of government were to propose that funds dedicated for religious purposes be diverted for non-religious purposes, the constitutional violation would be clear and undisputed. Yet this is precisely what the landmarking law does by diverting resources dedicated to religious ministry to the alien and non-religious cause of architectural preservation.

By their very nature, religious buildings are distinctive and, therefore, convenient targets for landmarking. Freezing the past at the expense of present and future ministry, especially in a day of critical need, is unconscionable. For the Commission to substitute its judgment for that of the religious congregation in such matters arrogates to the Commission an unacceptable role in decisions respecting the conduct of religious ministry, which is abhorrent to our national heritage of liberty of conscience and freedom of religion.

III *A DEFECTIVE LAW USED TO ABUSE*

The United States Constitution provides that if the government forces an owner to sell his property to the government, the government must pay full value. This process is called "condemnation." If the government feels a building is worth saving for the public because of its architectural worth, it should buy the building with public funds. Instead, by land-

marking the building, it impairs or destroys the value of the property and achieves the same result as in condemnation but with the owner, not the public, bearing the cost of this public benefit.

The landmarks law provides for a lengthy process, including public hearings, for the legal designation of a building as a landmark. In this process *only* aesthetic and architectural considerations may be taken into account. No evidence can be admitted concerning the hardship which the designation may impose upon the owner or concerning possible governmental interference with the free exercise of religion or concerning the curtailment or diminution of the spiritual and human services which the Synagogue or Church has been providing to the community. Only *after* designation can the owner commence an entirely new and very cumbersome proceeding before the Landmarks Commission seeking to have his building "de-landmarked," and then *only* on the grounds of economic hardship. Again, no evidence can be admitted concerning constitutional violations or elimination of spiritual and human benefits. In measuring the economic hardship on nonprofit religious organizations, the law requires the Commission to consider the religious building *as if* it were not tax-exempt in order to determine whether it would then have been economically under-productive. This fairyland approach is a mirage because religious structures were typically never designed in the first place to produce rents or to be used for profitable business purposes. Thus the law denies to religious organizations even the extremely limited relief it allows to commercial organizations.

The landmarks preservation law, as it relates to the nonprofit sector, is thus inherently deficient. While a cumbersome process is available to a commercial owner who needs to have his building de-landmarked on the basis of "hardship" (inadequate profit), the same is not true for the religious and charitable owner. There is little possibility for the Commission to evaluate objectively the "profit/loss" of a nonprofit organization because, by definition, it does not exist. Relief under the

present law is hard to come by and very expensive to seek. In fact, we understand that in the 16-year history of the law, no religious structure has ever been de-landmarked on the basis of economic hardship!

When the methods and procedures of the Landmarks Preservation Commission are coupled with the law's deficiencies, outright abuse of the nonprofit sector is the result. Generally, the Landmarks Preservation Commission has willingly accommodated local groups in abusing the law by employing it for zoning purposes rather than for its lawful purpose of architectural preservation. Thus, buildings are landmarked less for reasons of architectural merit than to block any change or development in the neighborhood. People often fear change. But every living creature—including a community—has a need to grow (and, thereby, change) lest it die.

In the specific case of the Church of St. Paul and St. Andrew (on the Upper West Side) no effort was made to consider landmark status (after 14 years of the landmarks law) until the congregation began its study of development possibilities to replace its badly deteriorating structure. The Commission had to search far and wide to find a label for this architectural mishmash that even its designer chose not to have listed among his works in his biographies! The Landmarks Preservation Commission, on November 24, 1981, usurped control of this building by proclaiming it a "unique" example of an architectural style which it called "scientific eclecticism"—a self-contradictory term! Such inventiveness by a public commission raises legitimate questions, at the very least, about the competence with which the public is being served. If it were not so tragic, it might be almost amusing to note that, until the Commission's recent visit, not one tourist or student of architecture in over 80 years had ever visited the site to admire New York City's unique example of "scientific eclecticism"!

The Chairman of the Landmarks Preservation Commission has privately entreated religious leaders to accept the landmarking of religious structures in order to diffuse any commu-

nity protest about construction plans while promising speedy action, after designation, to approve demolition or alteration under the Commission's "hardship procedure."

Community Boards are learning how to exploit the landmarks law in abusive ways. Community Board No. 7 in Manhattan, citing the "sudden" loss of All Angels Church (after eleven years of very public financial agony), recommended the designation of the Church of St. Paul and St. Andrew only when its interest in redevelopment became known. The Community Board, early in 1980, proposed a grossly unconstitutional plan which would have forced every Synagogue and Church in the District to publish in minute detail its finances and operations, including lists of all capital and current assets, building utilization patterns and the value of all objects of art. The plan, revealingly entitled by the Community Board's Landmarks Sub-Committee "Preserving Neighborhood Houses of Worship, their Congregations and Social Programs: *New Frontiers in Community Planning*," (emphasis added) was dropped after the Committee of Religious Leaders pointed out that the landmarks law was enacted for architectural preservation, not for "community planning" (zoning).

Community Board No. 5, Manhattan, convened hearings on a proposal for the redevelopment of St. Bartholomew's Parish House—even *before* the congregation had an opportunity to make its own decision on the project. The several City Councilmen in Manhattan also moved quickly to express a prejudicial view prior to the congregation's action. Councilman Edward Wallace, for example, is using his office to mail voluminous propaganda in opposition to the St. Bartholomew proposal—including a fund raising appeal from "The Committee to Oppose the Sale of St. Bartholomew's Church, Inc." (The impropriety is doubled when one notes that it has *never* been proposed to sell St. Bartholomew's Church!)

Another defect in the landmarks law which encourages arbitrariness, irresponsibility and abuse is that it gives any person or group the right to petition for the landmarking of a Church or Synagogue and to speak and present evidence at the

landmarks hearings just as if they were the owners of the building, whereas in fact they have no interest in the mission of the congregation, have never contributed to or personally served in its ministries, care nothing for the people it serves and are oblivious of the service which the religious organization has rendered to people in the community for decades or even generations. Suddenly all this is counted for naught and they are given the right to impede those ministries by fossilizing a building which has never had any reason to exist other than to promote those ministries—a building for which they never even gave a dime to construct or maintain. Small wonder that the Synagogue or Church takes umbrage at the sudden interest all these otherwise unknown people display in the previously unnoticed "beauty" of their congregation's building—usually as a pretext for preventing lawful development of the site—which is not the purpose of the landmarks preservation law.

The law provides that building and demolition permits are to be denied only *after* a building has been legally designated a landmark. But the Landmarks Preservation Commission asserts its right to block the issuance of building and demolition permits prior to designating a building as a landmark and, apparently, even prior to the legally required public hearing on the matter. The developer who purchased the Seventh Day Adventist Church on West 79th Street in Manhattan (formerly the Mt. Nebo Synagogue) was denied a demolition permit in December, 1981, when the building was *not* a designated landmark, was *not* in an historic district and, insofar as the public record reveals, had *not* even been the subject of any landmark hearing. Nevertheless the Department of Buildings placed a telephone call to the Landmarks Preservation Commission upon receipt of the application for a demolition permit, and the permit was denied. Is this "extra-legal" power to be applied against all present or former religious buildings? By what authority may a routine permit be denied to the owner of a nonlandmarked building, seeking to deal with his property as he is lawfully entitled to do? Is the Landmarks Preservation Commission above the law?

Simply in the routine exercise of its duties under the current law, the Landmarks Preservation Commission works hardships on religious organizations which are then compelled to petition it for relief. Increased construction costs, professional fees for architects and attorneys to plead before the Commission, and a variety of indirect costs (eg. continued maintenance and operation of an outmoded and energy inefficient facility) place an incredible burden on the Synagogue and Church. This amounts to the officially-mandated misappropriation of funds from essential functions of ministry to functions of government never authorized by law. Some additional examples follow:

1) *Conservative Synagogue of Fifth Avenue* (East 11th Street, Manhattan): This Synagogue is in a small building which was originally built as a carriage house and, in 1923 converted to a residence. It is not landmarked by specific action, but it is located within the Greenwich Village Historic District and therefore is compelled to comply with all landmark requirements.

The congregation has proposed to extend the existing building and has engaged an architect who lives in the community and has had extensive experience in designing religious buildings. Extensive plans were developed which incorporate both the needs of the congregation and consideration for the surrounding structures in the District. The local Community Board endorsed the proposal. After several sessions with the Landmarks Preservation Commission (requiring thousands of dollars in costs to the congregation), the Commission's architects criticized the design arbitrarily, requesting the use of inappropriate and expensive building materials. The plans must now be redrawn at considerable additional expense and delay, only to be again submitted to the vagaries of the Commission's architects who assume the role of aesthetic architectural laureates.

2) *Spencer Memorial Presbyterian Church* (Montague Street, Brooklyn): This Church was located in the Brooklyn Heights Historic District. The congregation was dissolved in 1975 and the property offered for sale by the Presbytery of New York City. Because the building was vacant (and thus no longer actually in use for religious purposes), the property was returned to the tax rolls. A purchase agreement was reached with the YMCA in Brooklyn Heights which proposed to retain the exterior facade of the building and make some changes in the roof area to accommodate a gymnasium and other community facilities. In the face of objections from some groups in the community to this proposed use, the Landmarks Preservation Commission refused to permit this plan. A revised proposal, which eliminated the roof alterations, was resubmitted and again rejected by the Commission. The YMCA, now exhausted by the process and its lack of affirmative response, withdrew its purchase offer. The property was subsequently sold under an unconditional contract to a private developer at a significantly lesser sale price. The developer promptly obtained approval from the Landmarks Preservation Commission to install apartments and shops in the building, retaining the exterior facade. The end result: The Church was deprived of fair value for its property; the YMCA, a nonprofit charitable organization, was deprived of the opportunity for necessary expansion of its facilities; the community was deprived of these expanded services; a private developer made all the profit—all to preserve the shell of a former Church. Whom is the Landmarks Preservation Commission really serving?

3) *Church of St. Paul and St. Andrew* (West 86th Street, Manhattan): The United Methodist congregation which owns this building is faced with significant costs to repair a continually deteriorating building of questionable architectural design. Nearly half of the church's annual budget is devoted to building maintenance and heating

cost, much of which would be unnecessary with a new, energy-efficient structure.

The congregation has the opportunity, through a developer, to lease its land for a high-rise apartment building in which it would occupy ground-level space for the congregation's ministry. The zoning law permits this type of development. The arrangement would enable the congregation, for the first time in decades, to have facilities which would be adequate for its ministry and a rental income that would help provide more charitable services in the community. Moreover, the apartment portion of the complex would be taxed at the usual rates, providing significant new income to the City and badly needed housing.

Despite the congregation's strong objection, the Landmarks Preservation Commission voted to designate the building in November, 1981. At great additional cost, the congregation must now continue to pour its funds down the drain of its present structure and bear additional heavy expense and legal fees in pursuing its need to acquire an adequate building for itself and funding for its ministry.

4) *The Village Church, Presbyterian* (13th Street, Manhattan): Located in the Greenwich Village Historic District, this congregation was dissolved in 1978 and the property offered for sale by the Presbytery of New York City. Because it was vacant it was restored to the tax rolls. The landmark restrictions on the property made its sale to other religious institutions undesirable and its sale to others very difficult. After three years, the property was sold (1981) to a private developer who converted the community house into apartments. These delays caused the Presbytery to incur heavy property taxes and management expenses and severely restricted its options in locating suitable purchasers who, understandably, are reluctant to get involved with the restrictions and time-consuming processes of the Landmarks Preservation Commission.

5) *St. Bartholomew's Church* (Park Avenue, Manhattan): This has become a cause celebre because of the vitriolic public debate which had taken place even before the congregation had agreed upon any specific proposal. The local Community Board found nothing unusual in condemning a development proposal which was not properly before it, and City Councilmen were disposed to hold a press conference denouncing this plan. These acts occurred weeks before members of the congregation could consider the proposal. The proposal, subsequently approved by vote of the congregation, would result in the demolition of the landmark parish house and the construction of an office tower on the site, containing Church facilities and preserving the parish house facade.

The decision as to the utilization of the Church's resources should be made by those with responsibility for the Church's ministries, not by outsiders having no interest in the Church or those it serves.

6) *Yeshiva Chofetz Chaim* (West 87th Street, Manhattan): This school is compelled to maintain its landmarked building at considerable expense. The owner's inability to modernize has become a serious impediment in carrying out its religious and educational purposes and, indeed, threatens its future existence.

7) *St. Paul's Roman Catholic Church* (Warren Street, Brooklyn): This parish had an elementary school which, due to dwindling enrollment, ceased to operate as a school. The desperate financial straits of the Parish together with the decrease in the size of the congregation did not permit the Church to expend the exorbitant cost of paying taxes on and maintaining a vacant building. A contract to sell the building to a developer was made in September, 1979. The building was a landmark only because it was located within the Cobble Hill Historic District. Therefore, it was necessary for the developer and the Church to apply to the Landmarks Preservation Commission for approval of the development plans.

While approval was eventually obtained, the time that was expended obtaining it proved fatal to the transaction. By the proposed closing date in March, 1981, the marketability of the type of development contemplated by the developer had vanished. The developer was unable to close on the contract and thereby defaulted. The Church now finds itself in the position of trying to locate a new purchaser in an unfavorable market lest it be saddled with maintenance costs and the property taxes which will be assessed on a useless building. It is clear that without the requirement of obtaining approval of the Landmarks Preservation Commission the transaction would have been completed: The property would have been sold, returned to the tax rolls of the City of New York at full value, and the Church would have obtained the necessary funds to continue its vital mission and ministry in the Cobble Hill area.

8) *Grace Church School, Episcopal* (4th Avenue, Manhattan): The School, located in the Greenwich Village Historic District, made plans in 1975 to replace its clergy house with a new building providing a gymnasium and a community center. The proposed structure was designed carefully to blend appropriately with the surrounding community. The Landmarks Preservation Commission rejected the plans, requiring that the facade of the old clergy house be retained. The Commission "worked" with the School to develop a "plan" to achieve its ends. It is reported that the facility which the School was forced to construct has proven to be considerably less than adequate for its purposes and needs.

By no means has this been an exhaustive discussion of all the problems with the landmarks preservation law and the Commission which implements it. One might consider the situation if the landmarks law had been in effect at the turn of the century: the City would now be studded with useless religious buildings from Wall Street through Midtown and to the upper

reaches of Manhattan. Not only would these buildings be occupying land needed for other uses, but they would be draining religious resources in ways that would undermine ministry and service to the people of our community.

Questions are raised within the architectural profession regarding the validity of the critical system employed by the Landmarks Preservation Commission. Its decisions appear often not to regard the owner's needs, timetable, or finances, or the right of those of our citizens who so desire to receive religious and human ministry. They keep property off the tax rolls even after it no longer is suitable for religious purposes. They divert funds contributed for religious uses to architectural preservation.

The landmarks law destroys hope—the hope of a small congregation that it can grow in size and, despite its small numbers, expand its ministries by the efficient use of its resources, including the fair value of its real estate. The law destroys the hope of a congregation that it can free itself from the crushing burden of maintenance and heating of a structure which has outlived its useful life and can no longer serve the purposes for which it was originally built.

IV *CONCLUSIONS AND RECOMMENDATIONS*

Following the year-long study of the impact of the official landmarking of religious property in the City of New York, it is the conclusion of this Interfaith Commission that the landmarks preservation law of the City is unworkable and unacceptable with regard to property owned by nonprofit organizations in general, and religious organizations in particular.

It is also our conclusion that the law has become a convenient means of abusing the civil and property rights of owner organizations by a variety of elected, appointed, and self-appointed individuals who bear no responsibility for the ongoing work of the religious congregations involved.

It is our conclusion, further, that the law as presently written and implemented violates directly the constitutional prohibi-

tion against governmental interference with the free exercise of religion in this City.

For these reasons, as documented herein, this Interfaith Commission recommends the adoption by the Committee of Religious Leaders of the following resolution:

RESOLUTION

WHEREAS, the Committee of Religious Leaders has caused to be established the Interfaith Commission to Study the Landmarking of Religious Property, to be made up of members named by the various Faiths.

AND WHEREAS, the Interfaith Commission has met regularly, and has been in dialogue with the Chairman and two senior staff officers of the Landmarks Preservation Commission and with other City officials and has submitted its Final Report;

AND WHEREAS, the interim report of the Interfaith Commission has been adopted by the Committee of Religious Leaders, including the Statement of Principles*, contained therein;

AND WHEREAS, the First Amendment to the Constitution of the United States provides protection with respect to religious institutions over and above the protection provided to other institutions, viz. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .";

AND WHEREAS, the present landmarks preservation law restricts the right of a congregation to decide which of its resources are to be used for its mission and which, if any, are to be allocated to architectural preservation;

AND WHEREAS, this interference with religious decision-making and ministry goes far beyond the legitimate right of government to require all owners (whether religious or

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* The Statement of Principles is set forth on page 2 of this Final Report.

otherwise) to maintain their buildings so as to protect the public safety and health;

NOW THEREFORE BE IT RESOLVED,

I. That the Final Report of the Interfaith Commission To Study the Landmarking of Religious Property be approved.

II. That the Committee of Religious Leaders shall prepare or cause to be prepared proposed legislation to amend the State and City landmarks laws, and that such legislation shall include the following provisions, among others:

a) A provision that no consideration shall be given by the landmarking authority to the landmarking of a property owned by a religious organization unless prior notice regarding such intended consideration be given to the official governing body of the congregation and its denominational judicatory or agency, if such exist.

b) A provision that, if any entity entitled to receive such notice shall file with the landmarking authority a statement that, in the opinion of that entity, the proposed designation will interfere with the present or future needs of ministry, either at its present or another location or both, the authority shall thereupon desist from further consideration of the matter.

c) A provision that, if any such entity should at any time file such a statement with the landmarking authority with respect to any property it owns or controls and which has at any time, whether before or after the effective date of the legislation, been designated as a landmark, the authority shall thereupon vacate its landmarking action or modify it as requested by such entity.

d) A provision requiring payment by the appropriate governmental body to the religious organization of all loss and expense, including loss of sale, rental or other opportunities, caused by the landmark designation of its property or consumed by the administrative process for designation or for removal of designation.

e) A provision clearly and unequivocally stating that the foregoing provisions respecting the property owned by religious organizations are made not because of special favor or political expediency but due to the protection provided to religious ministry by the United States Constitution.

III. That all Church and Synagogue authorities be encouraged to take prompt and substantial action to make their congregations and the leaders thereof aware of all the implications of the landmarking of religious structures and the threat this poses to religious freedom.

Respectfully submitted,

THE INTERFAITH COMMISSION
TO STUDY THE LANDMARKING
OF RELIGIOUS PROPERTY

/s/ N. J. L'HEUREUX, JR.
(Rev.) N. J. L'Heureux, Jr.
Chairman

APPENDIX A

Administrative Procedures Before The New York City Landmarks Preservation Commission.

1. *Initial Designation as a Landmark*

Any entity, including a private person or group, a governmental agency or a corporation, can propose a building or district for designation as a landmark. The Commission's policy is to require that all such proposals be in writing. The Commission staff preliminarily evaluates the proposal and if the Commission's Chairman (in discretionary consultation with one or more of the other Commissioners) so directs, the staff visits the site, takes photos, researches the historical background, proposes boundaries (if a district) and submits a report to the Commission. If the Commission feels the proposal lacks merit, it is dropped. Otherwise, the Commissioners visit the site to determine whether the proposal should be scheduled for a public hearing. The Commission may also, at this point, arrange for community consultation through the local Community Board and perhaps with other neighborhood groups. At this stage, it is still theoretically possible for the Commission to determine that the proposal lacks merit, in which case it would be dropped.

If a building is selected for calendaring at a public hearing, a legally required notice is sent to the owner, the local Community Board and certain public officials. A notice of the hearing is published for ten working days in The City Record. A public hearing may be conducted by as few as only one member of the Landmarks Preservation Commission. At the hearing, the owner of each property on the calendar of that hearing and any other person, including representatives (lawyer, architect, etc.) may make an oral presentation in favor of or in opposition to the designation. The owner and any others may also file written materials. A hearing, as to each property treated separately, may be "closed," "continued," or "closed with the

record kept open" (to permit later receipt of written materials by a specified deadline). After the hearing the research staff submits to the Commission a "designation report" on each property giving full historical, aesthetic and other information about it. No other aspects of the matter such as economic hardship, constitutional violations or impairment of ministries may be considered.

The Commission then meets separately in executive session to take a separate vote on each property as to which there had been a hearing. An affirmative vote of six of the eleven members of the Commission is required for designation. If the vote is insufficient for designation, the procedure is ended as to that property and the owner and others are so notified. If the vote is sufficient for designation, the property immediately becomes a "landmark" for all purposes and is thereupon subject to the regulatory jurisdiction of the Commission. It then becomes a criminal offense (misdemeanor) to demolish, remove or alter the building without the Commission's permission, even though the designation decision is by no means final, as noted below. Also, at this time, notice of the designation is sent to the owner and to the land recording office. This latter step prevents the issuance of a construction or demolition permit without the consent of the Commission. Although there seems to be no legal authority for doing so, the Commission claims the right to file some form of notice with the City Building Department to prevent the issuance of a construction or demolition permit even though the property has not been landmarked, or ever scheduled for a hearing. This, the Commission's Counsel says, would be done if the Commission assumed the building might be altered or demolished before the legally required landmarking process could be completed.

Within 5 days of the designation the Commission must file a copy of the designation with the Board of Estimate and certain other City Departments. The Board of Estimate must in turn notify the City Planning Commission which, in turn, must report back to the Board of Estimate on the effect of the designation on City's master zoning plan.

Within 90 days after the filing of the copy of the designation with the Board of Estimate, the Board "*may*" modify or disapprove the designation, and any such action is immediately effective. The Board of Estimate will also hold a public hearing to consider any landmark designation referred to it for review. The Landmarks law is defective and prejudicial to owners because it does not specify whether the Board of Estimate *must* review a designation and it does not specify the effect of its failure to review. By analogy to other parallel provisions of the law it may be concluded that a designation is rescinded if the Board of Estimate fails to approve it, but such an important point should not be left to implication.

If the Board affirms the designation, the owner is so notified. If it rejects or modifies the designation, the owner is so notified and a document is filed in the land records to remove the landmarking entry or to modify it, as the case may be. This action or failure to act on the part of the Board of Estimate results in the finalization of the administrative procedures with respect to the designation of a property or district as a New York City Landmark.

2. *Alteration of a Designated Structure*

Once the Commission has designated a building as a landmark, its jurisdiction extends only to those exterior portions of the building which are visible to the public and over interiors which have been so designated. Interiors of places of worship may not, by law, be designated but this exemption may not apply to clergy residences, schools and other such affiliated properties. Any modification, however slight, whether interior or exterior, and whether or not it would require a construction permit, must have the prior approval of the Commission.

An application, with plans, photos and perhaps other materials, must be submitted to the Commission for permission to make the alterations. Meetings with owners may be required. If the Commission feels the proposed work would not impair the architectural appearance or structural integrity of the structure, it will issue a document of permission to the Depart-

ment of Buildings and, where appropriate, to the owner. Without this document, the Department of Buildings will not issue a permit to begin the alteration work. There are 3 types of documents: (i) a "Certificate of No Effect on Protected Architectural Features" (issued where the proposed alteration or repair would not affect a protected feature of the building); (ii) a "Permit for Minor Work" (issued to permit work on a protected feature which is so slight that a construction permit is not required and the work will not significantly impair the building's architectural character; Commission representatives will visit the site before issuing this permit); (iii) a "Certificate of Appropriateness" (issued to permit major work on a protected feature which will be done in such a manner as to restore or not impair the architectural character or structural integrity of the building; a site visit and a public hearing are required before such a certificate will be issued).

Applications for Permits for Minor Work must be acted on by the Commission within 20 days, those for Certificates of No Effect within 30 days, and those for Certificate of Appropriateness within 90 days. However, even if the Commission fails to act upon any such application within the required time, it still remains illegal for the owner to proceed with the work, his only recourse being to sue the Commission to force it to act. This situation is unfairly prejudicial to the owner of the property.

3. *Removal of a Designation ("De-landmarking")*

If a religious organization wishes to demolish its landmarked building or to alter it so that its landmark qualities will be impaired or destroyed, it must institute an entirely new administrative proceeding in which it must show to the Commission's satisfaction: (i) that it has contracted to sell the property or to lease it for at least 20 years; (ii) that the building, if it were not tax-exempt, could not earn a "reasonable return" of profit (as defined); (iii) that the building is no longer suitable for the organization's purposes; and (iv) that certain other requirements have been met. The law is prejudicial to owners

in that it makes no provision for de-landmarking where an owner wishes to develop his property while retaining ownership of it. If the Commission is satisfied on all these points it must then endeavor to find another purchaser (or tenant) who would be willing to buy (or lease) the building on "reasonably equivalent" terms without impairing its landmark qualities. If no such purchaser or tenant can be found, the Commission must recommend to the Mayor that the City buy ("condemn") the property or at least an interest therein sufficient to protect the landmarked features. If the recommendation is accepted, the necessary City funds must be appropriated. Apparently there has never been such an appropriation even though tens of thousands of City structures have been landmarked. Another potential for abusive treatment of the owner of a useless building arises from the fact that, instead of condemning an entire building and paying fair value for it, the City could condemn only an "interest" in the building, such as a facade easement, for which only a nominal sum need be paid but which would achieve the same result as in full condemnation by effectively preventing the demolition or alteration of the useless building.

The time limits for all these de-landmarking procedures are specified by law and they would exceed one year.

APPENDIX B

Court Decisions Regarding the Landmarking of Religious Property

The constitutional questions which arise as a result of "landmarking" church property are twofold. First, is the landmark designation of religious property an invalid exercise of the police power under the due process clause? Second, and more important, is the constitutional right of free exercise of religion violated by such a designation?

The State has the power to regulate the use of private property for the common good. The constitutional difference between regulation and confiscation is that just consideration must be paid only if a confiscation or a "taking" is found. The distinction between these two powers is, at times, difficult to determine. In *Lutheran Church* v. *City of New York*, 35 NY2d 121 (1974), Judge Gabrielli stated that:

> . . . either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others. (Sax, *Taking and the Police Power*, 74 Yale L.J. 36,62,63); 35 NY2d at 128.

However, a regulation may be so burdensome on property that it becomes in effect a "taking" or "confiscation" of the economic value of the property. *French Inv. Co.* v. *City of New York*, 39 NY2d 587 (1976). Such a regulation is often deemed confiscatory but is in fact an unconstitutional exercise of the police power violating the Fifth and Fourteenth Amendments* to the United States Constitution and Article I, Sections 6 and 7 of the New York State Constitution.

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* The Fourteenth Amendment to the United States Constitution makes all relevant provisions of that Constitution applicable as against State governments.

Grand Central Station was designated as a landmark and the owners were prohibited from erecting the desired fifty story building over the existing Station. New York City's landmarks preservation law was found to be valid by a majority of the United States Supreme Court in the case of *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct. 2646, Rehearing Denied 58 L.Ed. 2d 198, 99 S.Ct. 226 (1978). Although the majority concluded that the law was constitutional, a determination was necessary as to the particular piece of "landmarked" property. "We now must consider whether the interference with appellants' property is of such magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 413, 67 L.Ed. 322, 43 S.Ct. 158 (1922)." 438 U.S. 104, at 136. The court found that this commercial property's present uses were not interfered with and therefore the designation was constitutional.

The New York Court of Appeals found a landmark designation of church property invalid in *Lutheran Church* v. *City of N.Y.*, 36 NY2d 121 (1974). The Lutheran Church, in 1942, purchased what had been the residential mansion of J.P. Morgan. The Church alleged that the mansion had become totally inadequate for the Church's purposes. This allegation was found to be virtually uncontested. The Church decided that the mansion be demolished and an office building be built in its place. The landmark designation of the mansion blocked these goals of the Lutheran Church.

The Court, equating landmarking to zoning, stated that a zoning ordinance is invalid if it prohibits the owner the use of the property for which it is adapted. An actual physical confiscation is not necessary before a constitutional violation of due process *can* be found. 35 NY2d at 129. The conclusion of the Court is that:

> [The Landmark Commission's attempt] to force plaintiff to retain its property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking . . . the commission, without any move toward

> invoking the power of eminent domain, is attempting to add this property to the public use by purely and simply invading the owner's right to own and manage . . . .
>
> . . . .
>
> . . . The power given the municipality . . . directly violates plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution and section 6 and 7 of article I of the New York Constitution. 35 NY2d at 132.

Interesting to note is the fact that the Court, in *Lutheran Church, supra*, avoided the issue of a possible breach of the First Amendment of the United States Constitution and Article I of the New York State Constitution which pertain to the free exercise of religion.

The New York Court of Appeals in the case of *Ethical Culture* v. *Spatt*, 51 NY2d 449 (1980), found the landmark designation of the religious property to be not confiscatory and therefore was faced with the constitutional issue of free exercise of religion. The New York City Landmarks Preservation Commission designated the meeting house of the society of Ethical Culture of the City of New York as a landmark. The meeting house had been built on Central Park West as a permanent home for the society's religious and charitable activities.

The Society opposed the landmark designation from the initial proposal up to the Court of Appeals. The battle began with the required public hearing. Later, the Society instituted an Article 78 Proceeding which was converted into a proceeding which sought declaratory judgment. The lower court decided the action in favor of the Society finding the designation unreasonable, confiscatory and therefore unconstitutional. The Appellate Division reversed the lower Court's decision and the Society appealed to the Court of Appeals.

The Society claimed and the court agreed that the designation would restrict the Society's realization "of the full economic value" of the Central Park West property, since the

development would require the demolition of the existing structures. The court cited numerous cases including *Penn Central Transportation Co.* v. *City of New York*, *supra*, to support its finding that the due process clause of both the United States and New York Constitutions had not been violated.

The *Lutheran Church* decision was differentiated, thereby avoiding the necessity of overruling that earlier decision. The Lutheran Church's needs were such that the court found the landmarked mansion to be totally inadequate and the church had only two alternatives, to build on or to abandon the property. The Court believed that although the Society's meeting house was no longer suitable for its present needs, alternative uses might exist, and there lies the distinction, albeit a very weak one, between the two cases.

The issue of free exercise of religion was dealt with in one paragraph of the decision. 51 NY2d at 456. The Society's entitlement to First Amendment protection was conceded but ". . . this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters." 51 NY2d at 456. The language of the court in setting the standard for permitting landmark designations is especially disturbing. The court explicitly limits a religious organization's due process argument and thereby opens the door for future infringement of free exercise of religion. Commercially owned property has a distinct advantage over religiously owned property, as the damages to one's religious exercise can not always be expressed in terms of dollars. The Court of Appeals said:

> . . . Charitable organizations are not created for financial return in the same sense as private businesses; for them the standard is refined to permit the landmark designation restriction only so long as it does not physically or financially prevent, or *seriously* interfere with, the carrying out of the charitable purpose. *Ethical Culture v. Spatt* 51 NY2d 449 at 454, 455.

It is disturbing to note that the Court seems to feel that the Constitutional prohibition against governmental interference with religion applies only to *serious* interference. It does not appear that this interpretation is supported by previous judicial pronouncements. Although the Court claims that the free exercise of religion is not violated, the judiciary will now be required to violate the separation of church and state each time a question arises as to what is a "serious" interference.

As previously stated, there is much that can be said for the position that the courts inadequately considered the landmarking of religious structures as a form of deprivation of religious freedom. The courts have not yet fully appreciated the magnitude of this violation of the Constitution. In the *Ethical Culture* case this is clearly shown by the Court's devoting only one paragraph in an otherwise lengthy decision to the free exercise of religion and its insistence upon using the term "charitable" organization as opposed to "religious" organization when deciding the case.

What is needed then is a well-planned case for presentation once again to the New York Court—one that clearly sets forth the fact that landmarking is not just a question of *financial* inconvenience but actually an unconstitutional infringement of the very fabric of the free exercise of religion.

APPENDIX C

The Interfaith Commission to Study the Landmarking of Religious Property

In September, 1980, the Pastor of the Church of St. Paul and St. Andrew (United Methodist) met with the Committee of Denominational Executives to plead for assistance in his problems with the Landmarks Preservation Commission. Immediately thereafter, the Episcopal Diocese of New York specifically requested the Committee of Religious Leaders to study the issues and to make recommendations for relief.

The Committee of Religious Leaders received these requests and acted to establish the Interfaith Commission to Study the Landmarking of Religious Property. The Rev. N. J. L'Heureux, Jr., Chairman of the Committee of Religious Leaders, also chaired this Interfaith Commission. The members, designated officially by the Faith group judicatories, are:

Rabbi Morris M. Goldberg
Congregation Ezrath Israel
Past President,
New York Board of Rabbis

Kevin M. Kearney, Esq.
Hurley, Kearney & Lane
Attorneys for the
Roman Catholic Diocese of Brooklyn

The Rev. N. J. L'Heureux, Jr., (Chairman)
Executive Director,
Queens Federation of Churches

George J. McCormack, Esq.
Cusack, Stiles & Hale
Attorneys for the
Roman Catholic Archdiocese of New York

Mr. Edgar Tafel
Architect

The Rt. Rev. J. Stuart Wetmore, D.D.
Suffragan Bishop,
Episcopal Diocese of New York

In addition, the Rev. Leland E. Gartrell, Divisional Director of Planning and Research, Council of Churches of the City of New York, served the Commission as resource consultant.

During the year of its existence, the members of the Interfaith Commission met in full session about once a month and additionally in sub-committees. Each member was assigned a portion of the subject matter to be studied. The Commission also met at length with the Hon. Kent L. Barwick, Chairman, Ms. Lenore Norman, Executive Director, and Ms. Dorothy Miner, Counsel, of the Landmarks Preservation Commission. A sub-committee also met with Deputy Mayor Robert Wagner and Mr. Herbert Rickman, Assistant to the Mayor. The Mayor has yet to honor his promise to meet personally with the Interfaith Commission.

* * *

CONFERENCE UPDATE
New York State Catholic Conference
119 Washington Ave., Albany, N.Y. 12210

April 1986

LANDMARKING: MINISTRY VS. MORTAR

UNJUST BURDEN

Throughout New York State well over 100 villages, towns and cities have passed landmarking ordinances that take away from our churches and synagogues the right to determine whether available resources should be expended on religious and human welfare programs, or on the preservation of the original appearance of their buildings. These laws force the diversion of monies contributed for religious purposes to serve the non-religious cause, however worthy, of historic preservation—and without consent or compensation.

Every building owner has the responsibility to maintain his building so as not to endanger public health and safety. But the owner of a landmarked building must carry additional burdens. He must, for example, replace a decorative upper wall molding that would not otherwise be replaced with a new molding that, in the opinion of the landmarks commission, is an exact duplicate of the original. The owner must pay for the architects and lawyers needed to make the presentations before the landmarks commission to obtain its approval of the molding design and color. The excessive cost of such preservation must be paid by the congregation at the expense of its religious ministry. Even routine repairs and maintenance, such as painting, must pass through the commission for permission. Thus, landmarked building owners shoulder ongoing burdens which are far greater than the responsibilities carried by non-landmarked building owners.

The burden of landmarking is particularly unjust to religious communities because in our society the religious communities

have erected and maintained by far the largest number of beautiful and distinctive buildings over the centuries. Generations of citizens have freely enjoyed these buildings and the Catholic Church has a long and proud history of creation and preservation of its architectural treasures. But today, when a congregation wants to use its dwindling resources in a more productive manner or to relocate, it is told that it is forever bound to the soil—that as first priority it must, under threat of criminal fines and imprisonment, beg or borrow the money to preserve the original appearance of its building. If, and only if, it has any money left over may it devote that "surplus" to its religious mission and ministry.

Some of the ordinances contain provisions which purport to allow "de-landmarking" if the owner can prove to the satisfaction of the landmarks commission that the landmarking is causing "hardship." These de-landmarking procedures can be extremely time-consuming and costly as architects, accountants and lawyers must be hired to prove to the commission how much money the congregation has and how it is using that money. This is a constitutionally improper entanglement by governmental agencies in the affairs and decision-making policies of a religious organization.

Further, landmarked owners find themselves in a catch-22 situation. The ordinances almost invariably require that some of the members of the landmarks commission be of preservationist, architectural or related disciplines. This makes the owner's chance of success highly unlikely since he does not appear before the usual neutral governmental agency but before the same non-neutral agency which had originally gone to considerable effort to landmark the building. Such a "rigged jury" system constitutes a denial of "due process" and "equal protection" as required by our Federal Constitution.

Two Illustrative Cases

The Reverend Msgr. Nicola Marinacci is lawfully subject to criminal fines and imprisonment because he replaced all the windows of his parish school with aluminum thermal-pane

windows with sliding screens. The old wooden windows were delapidated, letting in the cold in winter and the heat and flies in summer. The school building is "protected" by landmarking.

All three senior staff members of the local landmarks commission met simultaneously with the Pastor and his lawyer to advise him that they could have him fined and/or jailed because his new windows had large single panes whereas, when the school was built over 150 years ago, each window had several small panes. Msgr. Marinacci produced photos proving that some of the removed windows already had large single panes, but the landmarks officials said that no one would have noticed that. Msgr. Marinacci stated that none of the windows he removed were the originals; that all of the original windows had been previously replaced more than once over the years. The three landmarks officials said that was irrelevant; correct historicity required that all windows be wooden with small multiple panes.

The Pastor pointed out the great expenditure he had just incurred to install the new windows, the great cost of removing them and the far greater cost of installing new, wooden, multiple-paned windows (presumably without screens as screens had not been invented when the school was built). The Pastor stated that the parish lacked the money to again change the windows. He pointed out the need of over 600 school children, teachers and staff for warm rooms in winter and proper, healthy ventilation in the summer. The landmarks officials remained firm in their assertion that these considerations were all irrelevant to the re-creation of the original appearance of the structure.

Msgr. Marinacci's lawyer proposed that, to avoid the fines and jail, the Pastor be permitted to install plastic snap-on pane dividers. The landmarks officials rejected this proposal, too, because, they said, everyone would notice that the depth of the snap-on pane dividers was less than the depth of built-in, wooden pane dividers.

Historicity, by governmental edict, is more sacred than the children.

* * *

The small Methodist congregation of St. Paul and St. Andrew had decided it could no longer afford to heat, maintain and insure its ancient, crumbling, undistinguished and useless church building, a building which was *not* a landmark. They decided to replace their "white elephant" with a building which would incorporate some space for church functions plus residential apartments to help support Church operations. The rented part of the building would go back on the public tax rolls. Thus, the Church could prevent its own demise.

However, some "neighbors," who did not want their own apartment views obstructed by a new building, formed "The Friends of St. Paul and St. Andrew." None of the "Friends" had ever been a member of the Church; none had ever contributed to it; none had ever served on its neighborhood outreach ministries. Despite the congregation's strenuous objections, the "Friends" persuaded the local landmarks commission to landmark the building in perpetuity as an example of "scientific eclecticism." The congregation was doomed to extermination as it did not have enough money to maintain, much less preserve, its unwanted Church building. With assistance from other Methodist groups, this congregation has been trying in the courts for over four years, and at great expense, to regain control of its own property and prevent its own annihilation.

Historicity, by governmental edict, is more important than worship and religious ministry.

THE "PRESERVATIONISTS"

A small, well-organized, highly articulate aesthetic elite promotes this fossilization of religious structures withou compensation or compassion. Developers and "neighbors," who want to preserve their lovely views over low-rise churches and synagogues, can use the landmarks laws to force the congregations to maintain these views in perpetuity and at the congregation's expense. This is profiteering on someone else's property by those who believe that the buildings are holier than the people whom the buildings were built to serve. The churches

and synagogues, whose members contribute financially week after week, are the ones who should decide when and if the time has come to alter or demolish their own buildings.

If the government wants to capture a religious building as a public amenity, it always has the right to condemn the building—paying fair value for it. The problem is that the historic preservationists want to capture the building for their own aesthetic pleasure and pay nothing, knowing that the government will fine or jail anyone who believes that worship and ministry are more important than bricks and mortar.

Those who suffer more and more from landmarking are those who are the most needy and most rejected in our society: the disadvantaged, incapacitated, and helpless poor who, in disproportionately large numbers, look to our religious communities for help—whether of a spiritual, emotional, medical, human or financial nature. As buildings age, making their preservation ever more costly, there will be less and less funds available for the many human service programs operated or supported by our religious communities.

* * * *

State legislation requiring the consent of religious owners to the landmarking or continuance of the landmarking of individual religious properties would alleviate this unjust burden. This would ensure that the assets of a religious organization can properly be used as the organization, not the government, decides, whether for building preservation or in service to the needs of the people. This is, after all, simply what our Constitution guarantees when it prohibits governmental interference with the free exercise of religion.

A bill has been introduced in the State Legislature which would help to alleviate this problem. Those interested in this issue should, as concerned citizens, communicate with their Assemblyperson and Senator without delay.

Buildings must never be regarded as more important than people.

Supreme Court, U.S.
FILED
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CLERK

(3)

No. 86-397

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

-against-

KENT L. BARWICK, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the City of
New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-4338 or 4375

LEONARD J. KOERNER,*
EDWARD F. X. HART,
of Counsel

November 3, 1986
*Attorney of Record

63pp

COUNTER-QUESTIONS PRESENTED

1. Does a controversy ripe for judicial review exist where petitioner, owner of a designated landmark building, asserting hardship by reason of the designation, declines to seek relief from the landmark designation provided by the landmark statute as interpreted by New York state courts?

2. Is the Free Exercise clause implicated in the designation of a landmark because the landmark building is a place of religious worship, where the landmark law provides relief if the owner demonstrates that the building is not adequate, suitable or appropriate to its purposes?

3. Assuming, arguendo, that a Free Exercise question may be implicated, is there a sufficiently developed record herein for a proper adjudication by this Court?

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EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

-against-

KENT L. BARWICK, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

Petitioner seeks to have this Court review by writ of certiorari an order of the New York State Court of Appeals, entered June 5, 1986, which affirmed an order of the New York Supreme Court, Appellate Division, First Department, entered April 25, 1985, which affirmed, without opinion, an order and judgment of the New York

Supreme Court, New York County, entered September 17, 1984, granting respondents' motion for summary judgment and dismissing the petition on the ground that there existed no controversy ripe for judicial review. Petitioner challenged the Landmarks Law as applied to it, alleging that it effected a "taking" of property without due process or just compensation and interfered with the free exercise of religion. Respondents argued that no controversy existed since the petitioner refused to apply to the Commission for a Certificate of Appropriateness to reconstruct, alter or demolish as required by the statutory scheme of the Landmarks Law (Administrative Code of the City of New York, §207.-5 et seq.). The New York State Court of Appeals (three judges dissenting) agreed with respondent that the case is not ripe for adjudication until after the Commission has had an opportunity to

act upon an application by petitioner to effectuate its rebuilding plan, portions of which involve secular usages.

Procedural Background

During the fall of 1979, the Landmarks Preservation Commission's research staff compiled a proposed list of buildings to be considered by the Commission for possible designation as landmarks in 1980, including the Church of St. Paul and St. Andrew. The Commission included the Church on its 1980 priority list, and, on or about January 2, 1980, the Church was notified that a public hearing on its possible designation was calendared for March, 1980. The hearing was held and then continued to May 13, 1980, at the request of the Church. At both hearings, officials of the Church and their legal counsel opposed designation on the ground of financial hardship. The Commission's position, based upon §207-1.0

of the Administrative Code of the City of New York, is that, in determining whether to designate a building a landmark, the only criterion to be considered is the historical and aesthetic value of the structure itself. The Chairman of petitioner's Board of Trustees stated that the Church intended to convert a portion of its property into an income-producing use, i.e., a residential building. See, Opinion of the New York State Court of Appeals, Appendix 5a. In a statement to the Landmarks Commission on June 17, 1980, he stated:

> "The Church's only hope of saving itself is to convert a portion of its property into an income producing use. Specifically, the Church desires to preserve a significant portion of its sanctuary, including the corner tower, and to develop on the remainder of its land a residential building. In this way the Church could remain at its current location, save as much of its current structure as possible, and create an income source that would permit the Church to continue to exist."

At the further request of the Church, the record of the hearing was several times kept open for additional periods of several months each, so that additional information could be submitted to the Commission.

Prior to the public hearing, Counsel to the Commission, the Executive Director of the Commission and the Chairman of the Commission met with various officials of the Church and apprised them of what steps they could take pursuant to the Landmarks Law in the event that the properties were designated landmarks and they sought to reconstruct, alter or demolish the designated property. At that time, both the statutory procedure applicable to tax-exempts who wish to alienate their landmarked property and the judicially-created procedure for tax-exempts who do not wish to alienate but to reconstruct or demolish were explained to plaintiff.

The Landmark Designation of the Church

The Church of St. Paul and St. Andrew was designated a landmark by the Commission on November 24, 1981. Designation was approved by the Board of Estimate on March 18, 1982. There is no dispute regarding the importance and quality of the landmarked church and attached parish house. The lot upon which the Church stands is 150 by 125 square feet, and consists of the Church and attached parish house, a rectory and a courtyard. Only the exterior of the Church and the parish house were designated landmarks. Neither the interiors of the Church and the parish house nor the rectory and the remaining property are covered by the designation. Although the rectory was considered for landmark designation, it was found not to meet the statutory criteria and was not designated.

On March 23, 1982, five days after Board of Estimate's approval of designation, petitioner commenced the instant action pursuant to 42 U.S.C. §1983, seeking a declaratory judgment, an injunction and damages. Specifically, plaintiff sought a declaration that the designation of its building as a landmark was unconstitutional and that the Landmarks Law, as applied to it, was unconstitutional. In its answer, the Commission raised as a defense, inter alia, plaintiff's failure to exhaust administrative remedies and failure to state a cause of action, alleging that plaintiff failed to apply to the Commission for relief pursuant to Landmarks Law, §207-5.0, et seq. Petitioner argued, citing Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), that petitioner is not required to exhaust administrative remedies in a section 1983 action. Thereafter, the Commission made a

motion to amend its answer to allege, based upon the same facts, failure to raise issues ripe for judicial review rather than exhaustion of remedies and for summary judgment on the ground that the action is premature since petitioner failed to apply to the Commission for either a Certificate of Appropriateness or for hardship relief and, therefore, had failed to raise issues ripe for judicial review.

The Landmarks Law - Regulatory Scheme

In 1965, the City of New York established a comprehensive program for historic preservation by adding §2004 to the New York City Charter (now §534) and Administrative Code of the City of New York, Chapter 8-A, §205-1.0 et seq. ("the Landmarks Law"). The City Council has set forth a statement in §205-1.0 of the public policy sought to be furthered by this enactment; the legislative findings set forth

therein state that "many improvements, representing the finest architectural products of distinct periods in the history of the city, have been uprooted notwithstanding the feasibility of preserving and continuing the use of such improvements . . . and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements." Id.

The Landmarks Preservation Commission is composed of eleven members, including "at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor." New York City Charter, §534.1. The Commission is empowered to designate landmarks, interior landmarks and historic districts after

holding public hearings.[1] Landmarks Law, §207-2.0. In determining whether to designate a building or other improvement as a landmark, the only statutorily-recognized criterion to be considered by the Commission is the building's "special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation..." §207-1.0 n. Thereafter, the Commission is authorized to regulate construction, reconstruction, alteration and demolition of any landmark site or any improvement parcel or portion thereof located in an historic district.

Designation does not preclude a landmark structure from being changed.

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[1]Since 1965, the Commission has designated approximately 730 landmarks and 48 historic districts.

Instead, recognizing the numerous circumstances under which a property owner might seek to alter or even demolish a designated building, the Landmarks Law contains a comprehensive scheme of regulatory options under which an owner can apply to the Commission for permission to make changes. The Commission issues a Permit for Minor Work pursuant to §207-9.0 if the alteration does not require a Building Department permit; the Commission must make its determination within 20 working days of the owner's filing of the application. If a Building Department permit is required, the Commission issues a Certificate of No Effect on Protected Architectural Features pursuant to §207-5.0 if it determines that the proposed work will not change, destroy or affect any exterior architectural feature of the improvement; the Commission must make such determination within 30 days of

the filing of the application. Otherwise, the Commission considers the application under the criteria for a Certificate of Appropriateness pursuant to §207-6.0. If the application is for an individual landmark, the Commission is to consider

> "the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value." §207-6.0(d).

In connection with each application for a Certificate of Appropriateness, the Commission holds a public hearing; it must make its determination within 90 days of filing. §207-7.0. In recent years, the Commission has granted, on an annual basis, approximately 1500 of these different types of permits.

The Hardship Procedure

In cases where the Commission denies a request for a Certificate of Appropriateness, and in cases where the owner seeks total demolition of a landmark, the Landmarks Law contains a procedure for a "request for Certificate of Appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return" (§207-8.0), commonly known as the "hardship" provision of the Landmarks Law. This provision, together with the applicable procedures for a Certificate of Appropriateness referred to above, afford landmark owners ample protection against even the most remote and speculative threat of an unconstitutional "taking" by the Commission. For parcels which are subject to real estate taxes, the Landmarks Law authorizes a property owner to alter inappropriately or demolish his designated structure if 1) the Commission

determines that the property is yielding an insufficient return; 2) the Commission cannot develop a plan acceptable to the owner to eliminate the hardship; and 3) the City does not exercise its condemnation powers to acquire the property (§207-8.0).

With regard to tax-exempt parcels,[2] the Commission's determination of "insufficient return" is based on a different set of findings.[3] The statute provides that the owner demonstrate 1) that there is an agreement to sell or lease contingent upon Commission authorization of demolition or inappropriate alteration; 2) that the property

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[2]Plaintiff's church property is, of course, exempt from real estate taxes under §421-a of the New York Real Property Tax Law.

[3]These provisions of the statute were extensively discussed with approval by this Court in Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 110-113, n.13 (1978).

could not earn a reasonable return if it were not tax-exempt; 3) that the structure is no longer adequate, suitable, or appropriate to its past or present purposes; and 4) that the prospective buyer intends promptly to alter or demolish the structure (§207-8.0[a][2]). While this section is worded so as to condition the preliminary finding of insufficient return upon proof of an agreement to sell or lease the property, the Commission has made such a preliminary finding in the absence of such contracts based on the judicially-created hardship test discussed below.

In a situation in which the applicant is unable to meet the statutory criteria set forth above, the Commission will still make a preliminary finding of insufficient return if the applicant meets the judicially-created test for hardship, as set forth in Society for Ethical Culture v. Spatt, 51 NY2d 449

(1980),415 NE2d 922, Lutheran Church v. City of New York, 35 NY2d 121 (1974), 316 NE2d 305 and Sailors' Snug Harbor v. Platt, 29 AD2d 376 (1st Dept., 1968), 288 NYS2d 314. The test requires that, if a charitable or religious institution not desiring to sell or lease its property can establish that designation restrictions financially or physically prevent or seriously interfere with its charitable or religious activities being carried out in the building, a preliminary finding of "insufficient return" shall be made. However, this finding will be conditioned upon the applicant's demonstrating that the proposed alterations are being carried out to remedy the designated building's inadequacy or inappropriateness, and that the charitable or religious owner intends to proceed with the proposed alterations with reasonable promptness. Once the preliminary finding of

insufficient return is made under either the statutory or judicially-created test for hardship, 1) the Commission may thereafter develop an alternative plan acceptable to the owner or 2) the City may, upon the recommendation of the Commission, exercise its condemnation powers to acquire the property. Failing this, the Commission must issue a Notice to Proceed with demolition or with inappropriate alteration.

ARGUMENT

THE CONSTITUTIONALITY OF THE ACT OF LANDMARK DESIGNATION HAS BEEN UPHELD ON THE GROUND THAT IT DOES NOT CONSTITUTE A "TAKING" OF PROPERTY. MOREOVER, BY VIRTUE OF THE POST-DESIGNATION REGULATORY SCHEME, THE COMMISSION IS EMPOWERED TO GRANT RELIEF FROM THE RESTRICTIONS OF THE LANDMARK DESIGNATION OF A RELIGIOUS BUILDING UPON APPLICATION. SINCE PETITIONER HAS FAILED TO APPLY TO THE COMMISSION FOR ANY RELIEF FROM LANDMARK RESTRICTIONS, NO CONTROVERSY EXISTS AND THE CASE IS NOT RIPE FOR JUDICIAL REVIEW. THE FACT THAT PETITIONER IS A RELIGIOUS ORGANIZATION IS IRRELEVANT TO THE QUESTION OF WHETHER THERE IS AN UNCONSTITUTIONAL "TAKING" AND DOES NOT, PER SE, IMPLICATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Petitioner purports to challenge the constitutionality of the Landmarks Law only insofar as it is applied to its property rather

than on its face, the facial constitutionality having been unequivocally upheld by this Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). We submit that petitioner does, in fact, challenge facial constitutionality and only facial constitutionality rather than merely an unconstitutional application of the statute to its property. It is obvious that the constitutionality of a statute may only be challenged by a plaintiff when the statute is applied or there is an imminent threat of its application to a specific right or interest of that plaintiff. This is the case whether the challenge is made to the facial constitutionality of the statute or to the constitutionality of the statute as applied. Unless there is an application or imminent threat of application of the statute to the plaintiff, the plaintiff would have no standing to challenge the statute either on

its face or as applied since the statute would have no affect upon him. See, Doe v. Bolton, 410 U.S. 179 (1973).

By contending that the very act of designation of the property of an objecting church involves a "taking without just compensation" which rises to the level of a deprivation or is violation of its free exercise rights, petitioner is challenging facial constitutionality. This Court determined that a designation of property as a landmark does not, solely by the fact of designation, constitute an unconstitutional "taking". Penn Central Transportation Company v. New York City, supra, 438 U.S. at 131. Nor can it be said that landmark designation, per se, impinges upon petitioner's free exercise rights. And it is the designation which constitutes the essence of petitioner's challenge herein. Only in a case, where the Commission has denied relief

from restrictions imposed by designation after an owner's application for a certificate of appropriateness or a demonstration of hardship pursuant to the hardship provisions of the Landmarks Law, may a challenge be properly termed a challenge to the constitutionality of the statute as applied. Since plaintiff has refused to avail itself of either the alteration procedures or the hardship procedures provided in the Landmarks Law, it may not challenge the constitutionality of the statute as applied to it since it has never been applied. If, after the Commission has been afforded an opportunity to fashion relief and has reached a final determination of the application, plaintiff believes itself unconstitutionally deprived of property because the relief from the requirements of its landmark designation by the Commission are insufficient, it may

then challenge the constitutionality of the statute as applied to it.

1. Since plaintiff has not applied to the Commission for relief pursuant to the regulatory scheme, the case is not ripe for judicial review.

In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. ___ (1985), 105 S. Ct._____, 87 L. Ed.2d 126, 139, this Court stated that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." See also, Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981); Agins v. Tiburon, 447 U.S. 255 (1980); Willing v. Chicago Auditorium, 227 U.S. 274 (1928).

In Hodel v. Virginia Surface Mining and Reclamation Association, supra, 452 U.S. at 297, a decision upon which this Court relied in Williamson County, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977 effected a "taking" because:

> "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of §515(d) or a waiver from the surface mining restrictions in §522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution."

The above-stated principle is founded primarily upon the "oft-repeated admonition

that [questions of] constitutionality . . . ought not be decided except in an actual factual setting that makes such a decision necessary" and the recognition that, if a variance were sought, "a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional question." Hodel v. Virginia Surface Mining and Reclamation Association, supra, 452 U.S. at 294-95, 297. In addition, "it is common sense to permit the single, speedy, and inexpensive process of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts." Moore v. City of East Cleveland, 431 U.S. 494, 524 (1977) (Burger, J., dissenting opinion). Further, the principle "allows application of an agency's specialized experience and the broad discretion granted to local entities,

such as zoning boards. Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion or make a factual record reflecting all aspects of the problem." Id. at 524-25.

2. Petitioner's due process claim and free exercise claim are premature because there has not been a "taking" of plaintiff's property and because plaintiff has not sought relief from the Commission.

As indicated above, the designation of a building as a landmark does not involve a "taking" of property in a constitutional sense. Penn Central Transportation Company v. New York City, supra, 438 U.S. 104. Thus, there can be no violation of plaintiff's Fifth Amendment and Fourteenth Amendment rights by virtue of the designation of its church building as a landmark.

Moreover, until there is a final decision by the Commission upon an application by plaintiff for relief from landmark restrictions allegedly interfering with the religious or charitable activities being carried out in the building, plaintiffs due process claim is premature. As this Court stated in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra, 473 U.S.___, 105 S. Ct._____, 87 L. Ed.2d 126, 147, in disposing of the plaintiff's due process claims:

> "We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a 'taking' for which just compensation must be paid does not resolve the difficult problem of how to define 'too far,' that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we

> have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations."

In the case at bar, plaintiff has yet to apply to the Commission for relief from any alleged hardship to which it is being subjected. By its own choice it has refused to avail itself of the due process provided by statute. Until it has done so and the Commission has arrived at a final determination, no controversy exists. Therefore, plaintiff's due process claim and free exercise claim are premature.

Petitioner's claim that it is threatened with prosecutorial action initiated by the

City upon landmark designation is unsubstantiated upon the record herein or in any other case in the more than twenty year history of the Landmarks Law in New York City. While the law does impose a duty to maintain the landmark's exterior, no prosecutorial action would be or could be taken upon application by the owner of a landmark for relief from the consequences of landmark status. This is clearly the case in light of the short statutory periods permitted the Commission to consider applications for alterations and demolitions. Indeed, the instant record demonstrates the solicitude of the Commission for any potential hardship to petitioner as a result of landmarking as indicated by its offer to expedite any application by petitioner. Rather than threatened with prosecution, petitioner has at all times been encouraged to avail itself of the Landmarks Law's remedial provisions.

Petitioner's reliance upon Colautti v. Franklin, 439 U.S. 379 (1979), Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), Doe v. Bolton, 410 U.S. 179 (1973) and Pierce v. Society of Sisters, 268 U.S. 510 (1925), is misplaced. While the plaintiffs in these cases were not threatened with imminent prosecution, they were held to have standing to sue. However, none of these cases involved, as in the instant case, a statute which allowed individuals to seek an exemption from the statute's application as does the Landmarks Law. Simply by committing certain prohibited acts, the plaintiffs were liable to be prosecuted pursuant to the challenged statutes. In the instant case, petitioner, by applying to the Commission pursuant to statute, may be relieved of its duty of compliance with the requirements of the challenged statute. Thus, the cases are distinguishable on the

basis of the absence of an "escape" clause in the cases upon which petitioner relies and its presence in the instant case.

3. The Landmarks Law procedures provide adequate relief for any of the difficulties experienced by petitioner as a result of its alleged financial status and the alleged inadequacies of its building.

It should be noted at the outset that the Commission neither concedes nor denies that petitioner is without sufficient funds to maintain its landmarked building or that petitioner's building is inadequate for its religious or charitable activities. These issues were not germane to the sole issue before the Court on respondents' summary judgment motion, i.e., whether petitioner is required to apply to the Commission for relief before a controversy exists for judicial review. The Commission has no basis upon which to accept or reject allegations of hardship by petitioner nor any opportunity

to work with petitioner to seek to alleviate any such hardship since petitioner has refused to present its allegations of its financial hardship or the landmark's physical inadequacy or its plans for rebuilding its church and income-producing improvements in the proper, statutorily-designated forum for examination and evaluation by the Commission. In any case, since petitioner has yet to apply to the Commission for either a Certificate of Appropriateness in order to alter or a Notice to Proceed to alter or demolish inappropriately or to demolish, either of which, if granted, would alleviate the hardship to which it alleges it is being subjected, its challenge herein is premature.

a. The Landmarks Law "Certificate of Appropriateness" Procedure

Section 207-6.0 of the Landmarks Law provides for a grant of a Certificate of Appropriateness in cases where an applicant

seeks to construct, reconstruct, alter or demolish a landmark. The statute requires the Commission to determine "whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of [the Landmarks Law]" and the Commission must grant the request if its determination on this question is in the affirmative.

As the New York Court of Appeals noted in determining the question of ripeness, petitioner has refused to apply for a Certificate of Appropriateness pursuant to section 207-6.0, although this section may well alleviate any and all alleged difficulties caused by the church's landmark status. 4a, 11a-13a. In fact, the only rebuilding plan to which petitioner referred on this record involved preservation of "a significant portion of its sanctuary, including the corner tower..." See, supra, page 4. Such

a proposal would fall squarely within the parameters of this section.

b. The Landmarks Law "Hardship" Procedure

Section 207-8.0(a)(2) of the Landmarks Law provides that in cases where property is tax-exempt, an applicant seeking a Notice To Proceed with demolition or inappropriate alteration on Ground of Insufficient Return must demonstrate that: (1) it has entered into the agreement to sell or lease the improvement subject to or contingent upon permission from the Commission to proceed; (2) the improvement would not be capable of earning a reasonable return if it were not tax-exempt; (3) the improvement has ceased to be suitable, adequate or appropriate for the purposes to which it is devoted and those purposes to which it had been devoted when acquired (unless the owner is no longer engaged in pursuing those purposes); and (4) the prospective purchaser or tenant,

in the case of an application for a permit to alter, seeks and intends in good faith to alter the premises with reasonable promptness.

In its petition, petitioner implies that this section is applicable only to commercial hardship. See page 13, n.7. However, commercial hardship is covered by section 207-8.0(a)(1). See, supra, page 13. Section 207-8.0(a)(2) applies solely to tax-exempts, including charitable and religious organizations. In light of petitioner's contention that it desires to seek development of an income-producing improvement on its property while maintaining its religious presence as well, section 207-8.0a(2) is clearly applicable.

Once the Commission finds that the applicant has established the preliminary showing of insufficient return, section 207-8.0 authorizes the Commission to devise

alternatives which would permit the owner a reasonable return or beneficial use of his property. With respect to tax-exempt properties, the statute additionally provides that the Commission has the right to find a purchaser or tenant who will purchase or lease the landmark under reasonably equivalent financial terms to the contingent contract already made. The Commission may also propose alternative plans to alleviate hardship. Failing this, the Commission may recommend that the City seek to acquire an appropriate protective interest in the property. §207-8.0(i). The City must, within 90 days, initiate condemnation or purchase such a protective interest. Otherwise the Commission must issue a Notice to Proceed with demolition or inappropriate alterations.

In situations where there is no existing agreement to sell or lease the improvement,

the Commission has applied the test for determining hardship which was established in Sailors' Snug Harbor v. Platt, 29 AD2d 376 (1st Dept., 1968), 288 NYS2d 314, for those situations where the landmark's owner does not desire to alienate the property and is therefore unable to obtain relief under the statutory provisions applicable to not-for-profits. This test was subsequently adopted by the New York Court of Appeals in Lutheran Church in America v. City of New York, 35 NY2d 121 (1974), 316 NE2d 305, and Society for Ethical Culture v. Spatt, 51 NY2d 449 (1980), 415 NE1d 922. This test requires that the landmark designation restrictions not be applied where "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." Sailors' Snug Harbor, supra, 29 AD2d at 378, 288 NY2d at 316.

Upon such a finding, relief must be provided either through alternatives or relinquishment of the landmark restrictions. Sailors' Snug Harbor developed a procedure, adopted by the Court of Appeals, for determining when a not-for-profit organization has articulated facts under which maintenance so interferes with the charitable purpose (29 AD2d at 378, 288 NYS2d at 316):

> "[T]he answer would depend on the proper resolution of subsidiary questions, namely, whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure - all in the light of the purposes and resources of the petitioner."

Accordingly, in those instances where a charitable or religious institution owning a designated landmark does not wish to sell or lease its property in order to qualify for a

Notice to Proceed with a proposed alteration or demolition, the statute is interpreted to provide adequate relief. The Commission, applying this test in several instances, has permitted the total demolition of a landmark.

The affidavit of the Chairman of the Landmarks Commission in support of the motion for summary judgment, describes two instances in which the Commission has applied the judicially-created hardship test, one requesting partial and the other total demolition of buildings subject to the strictures of the Landmarks Law. The first of these applications was made in 1979 by the Episcopal Diocese of Brooklyn. The Diocese owned a church in the Fort Greene section of Brooklyn which had been destroyed by a fire. Rather than rebuild the Church, the Diocese determined that it would build housing for the elderly and sought funding from the Department of

Housing and Urban Development. When the Department informed the Diocese that the site was too small, the Diocese purchased an Italianate brownstone adjacent to the site. However, since the Commission had, in the interim, designated the Fort Greene Historic District, the Diocese could not demolish the brownstone without permission from the Commission. In this instance, the Diocese was faced with the threat of losing its mortgage commitment if it did not obtain its building permit within three months. Because of the severe time constraints, the Commission calendared for the same day a public hearing for an application for a Certificate of Appropriateness and an application based on hardship. The Commission denied the application for a Certificate of Appropriateness for demolition of the brownstone. However, acting on the hardship application, the Commission found

that any attempts to modify the design of the project to prevent the demolition would jeopardize the availability of the HUD mortgage, and that for the Commission to require the Diocese to sell or long-term lease the property would have frustrated the charitable purposes of the Church. The Commission therefore issued a Notice to Proceed with the demolition and the new construction. The entire procedure took just over two months from the initial filing of the applications.

The second of these hardship applications was made by the Marymount School, a Roman Catholic college preparatory school with a predominately female enrollment, to construct a rooftop gymnasium on three Beaux Arts townhouses on Fifth Avenue between East 83rd and East 84th Street. The buildings lie within the Metropolitan Museum Historic District. The

school determined that it needed its own gymnasium built on its rooftop and applied to the Commission for a Certificate of Appropriateness pursuant to §207-6.0, which was denied by the Commission on the ground that the plans detracted from the facades of the three townhouses. Marymount then applied for a Notice to Proceed pursuant to §207-8.0, submitting a revised plan. The Commission, finding the proposed addition still architecturally inappropriate and in view of the fact that the school had no desire to alienate the property, applied the judicially-created test for hardship applicable to non-profit institutions such as Marymount, i.e., whether lack of the gymnasium physically or financially prevented or seriously interfered with the carrying out of its charitable purpose. The Commission found that Marymount satisfied the test for establishing hardship; thereafter, the

Commission was unable to come up with a reasonable alternative (although alternatives were explored) and granted the Notice to Proceed with inappropriate alterations. The Commission was able both to preserve the building and satisfy the owner. Two cooperative corporations which own apartment houses adjacent to Marymount thereafter commenced an unsuccessful Article 78 proceeding in which they challenged, inter alia, the jurisdiction of the Commission to apply the judicial, as opposed to statutory, test of hardship. 1025 Fifth Avenue, Inc. v. Marymount School of New York and Landmarks Preservation Commission of the City of New York, Index No. 14910/83, N.Y.L.J. 12/30/83, p. 6, col 1. (Sup. Ct. N.Y. Co.). The Court held that the Commission could apply the test.

Had petitioner herein availed itself of this efficient procedure, the relief could

have been obtained in a far smaller fraction of the time and cost than the instant litigation has engendered. In addition, a record would have been sufficiently developed to permit judicial review in case petitioner was not satisfied with the Commission's relief.

As described above, the Commission may grant permission to construct, reconstruct, alter or demolish a particular building upon the application of an owner. §207-6.0. In this regard, it must be noted that only the exterior of the church and parish house have been designated a landmark. The potential for development of creative alternatives to demolition is enormous. The Commission may recommend amendments to the Zoning Resolution, §207-2.0(i), and may assist the owner with modification of bulk and use requirements or the transfer of development rights under the

Zoning Resolution.[4] See, N.Y.C. Zoning Resolution, sections 74-79, 74-711, 74-712, 74-721. Particularly useful is section 74-711 of the Zoning Resolution, which authorizes the Landmarks Preservation Commission to apply to the City Planning Commission for a modification of the use and bulk regulations applicable to the zoning lot upon which the landmark is situated. Similarly, section 74-79 provides for the transfer by special permit of unused development rights from a landmark to an "adjacent site", which need

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[4]Such a tack was, in fact, taken in the case of Villard Houses, on the east side of Madison Avenue between 50th and 51st Streets in New York City. See N. Marcus, Villard Preserv'd: Or, Zoning For Landmarks in the Central Business District, 44 Bklyn. L. Rev. 1 (1978). The utilization of these provisions is not limited to situations where the owner is seeking to alter inappropriately or demolish, and have frequently been used by owners in connection with applications for Certificates of Appropriateness under §207-6.0.

not be contiguous. Such possibilities are particularly relevant to the case at bar, in which a portion of the lot occupied by the Church is not designated and is owned by the same party. Similarly, if the owner can establish hardship, these provisions as well as tax abatement and other powers of the City could be utilized.

4. Petitioner has failed to demonstrate any infringement of its right to free exercise of religion by reason of its landmark designation or the requirement that an application be made to Commission to alter or demolish.

The Free Exercise clause is not a talisman which automatically protects religious organizations from any governmental regulation. E.g., Tony and Susan Alamo Foundation v. Secretary of Labor, 473 U.S. ___, 105 S. Ct. 1953, 1963-1964 (1985), (minimum wage, overtime and recordkeeping under the Fair Labor Standards Act does not

interfere with free exercise of religion); United States v. Lee, 455 U.S. 252 (1982) (requiring compliance of Amish employers and employees with Social Security tax scheme); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("[f]ire inspections, building and zoning regulations . . . are examples of necessary and permissible contacts"); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied sub nom. Mississippi College v. EEOC, 453 U.S. 912 (1982) (applying Title VII to educational institutions which are owned, controlled and operated by religious organizations). Rather, the Free Exercise clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner. Thomas v. Review Board, 450 U.S. 707 (1981); Sherbert v.

Verner, 374 U.S. 298 (1963). See also Bower v. Roy, 476 U.S. ___, 106 S. Ct. 2147, 2156 (1986) (plurality opinion) (neutral and uniformly applicable statute is valid if it is "a reasonable means of promoting a legitimate public interest."). The mere fact that a religious practice is burdened by a governmental program does not mean that an exemption accommodating that practice must be granted. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), cert. denied ___U.S.___, 104 S. Ct. 72 (1983); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert. denied ___U.S.___, 104 S. Ct. 371 (1983).

In the instant case, petitioner has failed to demonstrate that either the Landmarks Law or the landmark designation of its property infringes its right to freedom of religion. It is clear that defendants have

not regulated, prohibited or rewarded their religious practices or belief as such, nor have they in any manner burdened the plaintiffs in their religious practices or beliefs.

Petitioner claims that designation of its property as a landmark physically prevents it from carrying out its religious and charitable purposes which can only be effectuated in a new or reconstructed building. As we have already demonstrated, if this claim had been established before the Commission, the Landmarks Law itself provides for relief under these circumstances. Petitioner has offered no legally adequate justification for its failure to seek such relief from the Commission. Even if this Court were to find the claim ripe for review, petitioner has not demonstrated an infringement upon its right to free exercise of religion based upon its purported inability

to reconstruct its building as a consequence of landmark designation.

In fact, the prime ingredient in petitioner's rebuilding plan appears to be the construction of a high-rise income-producing residential building. However, secular enterprises, even when operated by religious groups, are not afforded protection under the religion clauses of the First Amendment. Tony and Susan Alamo Foundation v. Secretary of Labor, supra, 473 U.S.___, 105 S. Ct. 1953, 1964; United States v. Lee, supra, 455 U.S. at 261.

In Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 135, this Court likened the restrictions imposed by the Landmarks Law to prohibitions by zoning regulations, stating:

> "This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for 'aesthetic' reasons, two or more adult

> theaters within a specified area, see Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See Goldblatt v. Hempstead."

This Court has stated that religious organizations are not exempt from such secular governmental activity as "fire inspections and building and zoning regulations." Lemon v. Kurtzman, supra, 403 U.S. at 614. Certainly the landmark restrictions, upheld in Penn Central as reasonable governmental restrictions for the common good, cannot be said to infringe upon the free exercise of religion simply because they are applied to a church. See Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 135. Therefore, petitioner's claim that any and all regulation by a governmental agency of an objecting owner of a religious landmark is

unconstitutional is unsupported by the holdings of this Court.

5. As a result of the procedural posture of the instant case, the issues sought to be raised by petitioner are undeveloped and therefore, should not be reviewed at this juncture by this Court.

Since petitioner has steadfastly refused to make any application for relief from the strictures of its landmark designation, the record is sparsely developed. Despite petitioner's assertion that, because summary judgment was granted to respondents, the facts placed in evidence must be deemed true (citing Bishop v. Wood, 426 U.S. 341, 347 n.11 [1976]), it is clear that only those facts material to genuine disputes involving the issue on which summary judgment was granted must be resolved in petitioner's favor. Since the issue on which judgment was granted is whether petitioner is required to apply to the Commission for relief from

the requirements of designation as a landmark, facts regarding petitioner's financial status and its plans for rebuilding are not relevant to the issue of whether or not an application should first be made to the Commission. As noted by this Court in Penn Central, "[s]ince appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the air-space above the Terminal." 438 U.S. at 137. Likewise in the instant case, the Court could not know from the present record what petitioner intends to do with its property or whether some plan to save all or some of the landmarked facade, while fully accommodating petitioner's needs, can be found. Moreover, the issue of free exercise remained peripheral to the issue of ripeness, petitioner arguing that it was not required to apply to the Commission because

Patsy v. Florida Board of Regents, supra, 457 U.S. 496 (1982), held that section 1983 actions did not require exhaustion of administrative remedies.

In sum, we submit that, in view of the recent holdings of this Court on the issue of ripeness for review, the decision of the New York Court of Appeals herein was correct and review by this Court would serve no judicial purpose. Moreover, while the decisions of this Court interpreting the Free Exercise Clause of the First Amendment leave no doubt concerning the constitutionality of the Landmarks Law as applied to religious buildings, in any case, the present record does not provide a basis on which to adjudicate the issue fully and properly.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

November 3, 1986

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
EDWARD F. X. HART,
of Counsel
*Attorney of Record

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No. 86-397

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,
Petitioner,

v.

KENT L. BARWICK, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE
BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

FRANK PATTON, JR.
WILLIAM LEIBOVITZ
ELLIS, STRINGFELLOW, PATTON
& LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180
Counsel for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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SUMMARY OF REPLY

Contrary to the contentions of respondents, the constitutional questions raised by the Church are unavoidable. The Church's position from the outset has been that the nonconsensual landmarking of an active house of worship is itself unconstitutional (96a). Hence the case was ripe from the moment of landmarking the Church of St. Paul and St. Andrew. An enforced resort to the "ameliorative remedies" described by respondents and the Court of Appeals presumes the underlying constitutional validity of this landmarking. Hence all the "remedies" are irrelevant to the issue of ripeness.

REPLY

The Church addresses the following arguments first raised in the Brief In Opposition (hereinafter, "Br."):

1. That the Church challenges the facial constitutionality of the Landmarks Preservation Law. Respondents state that the Church attacks the ordinance, not as applied, but on its face, since (so respondents argue) there has not yet been "an application or imminent threat of application of the statute" to the Church. (Br. 19). Respondents also argue that, since landmarking a building is not a "taking", and anyhow does not impinge on the Church's free exercise rights (Br. 20), therefore "mere" landmarking is not an application of the Landmarks Law. Only (so the argument continues) after the Commission would have ruled on a request for a certificate of appropriateness or a statutory hardship application (Br. 21), could the ordinance be said to have been "applied".

The argument is obviously fallacious. Landmark designation is nothing *other* than an application of the Landmarks Law, and the Church's challenge to that designation is not a facial challenge seeking the complete invalidation of the Law as to every possible subject. *CSC v. Letter Carriers*, 413 U.S. 548, 580-581 (1973). Moreover, the argument is circular and proves nothing, it being merely a restatement of the Commission's arguments regarding ripeness.

2. That ameliorative relief was available to the Church and declined by the Church. Respondents' claim of lack of ripeness hangs on a single point: that the Church failed to utilize avenues of relief available to it before taking respondents to court. The lengthy and detailed descriptions of these avenues in the Brief In

Opposition — laced with pledges of administrative liberality[1] — are utterly irrelevant to the one claim here made by the Church: that the Constitution bars the landmarking of its house of worship.

The obstinate flaw of logic in respondents' position is that they will not come to grips with the only issue posed by the Church: landmarking, not ameliorated landmarking. The issue is not the prisoner's right to better prison conditions; it is whether he should be jailed at all. Therefore, from the moment the Church's house of worship was landmarked, the constitutional issue was posed. A question of ripeness could arise only if the Landmarks Law provided an express exemption for objecting houses of worship, and the Church would bring suit before seeking the exemption.

The Landmarks Law, of course, contains no such exemption.[2] And each of the kinds of alleged ameliorative relief set out in the Brief In Opposition is a blind alley which the Church of St. Paul and St. Andrew should not be forced to expend its fast disappearing assets to explore.

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1. *E.g.*, "a comprehensive scheme of regulatory options" (Br. 11); "short statutory periods permitted the Commission to consider relief applications" (Br. 28); "ample protection" for landmark owners in Certificate of Appropriateness proceedings (Br. 13); "solicitude" of Commission for any potential hardship (Br. 28); the Landmarks Law's "remedial" provisions (*ibid.*); "enormous" potential for development of "creative alternatives to demolition" (Br. 43); Commission denied opportunity to "work with" petitioner (Br. 30-31). Underneath this facade of benignity lies the hard resolution that houses of worship *shall* be landmarked at the will of the Commission and that religious considerations shall not be taken into account in designations. (Br. 4, 10).

2. In this it contrasts with the National Historic Preservation Act which forbids the designation of any privately owned property as a National Historic Landmark over the objection of the property's owner. 16 U.S.C. §470a(a)(6). Nor may the Secretary of the Interior acquire any interest, for historic preservation purposes, in any property owned by any religious institution without the consent of that institution. 16 U.S.C. §462(d).

The blind alleys which respondents describe are five:

a. Permit For Minor Work (§207-9.0). (Br. 11). This obviously has no application here, and the Church wonders why respondents cited it.

b. Certificate of No Effect on Protected Architectural Features (§207-5.0). (Br. 11). This, too, is completely irrelevant, in part, because the Church indeed has proposed to change and affect exterior architectural features.

c. Certificate of Appropriateness (§207-6.0). (Br. 12). Respondents here, as with the Permit For Minor Work and the Certificate of No Effect, point to the short time in which the Commission must act, and they add that the applicant gets a public hearing, and that the Commission has granted approximately 1,500 of these permits (*ibid.*) - all of those recitations being irrelevant.

First, respondents rely upon a 1980 statement of the chairman of the Church's board (Br. 4) as evidencing the Church's intention to leave part of its building standing. Respondents then argue that any constitutional issue in this case was avoidable since, had the Church sought a certificate that the standing portion was appropriate, the Commission might have agreed. The statement in question, however, was made prior to designation and in the course of the Church's resistance to landmarking. (Appellant's App., New York Court of Appeals, A44-A45). It must be viewed as nothing more than a tentative expression that the Church might desire to preserve a very small portion of its sanctuary structure (while demolishing most of the present building). The Church's subsequent and final pre-designation position (which respondents neglect to disclose) was one favoring total demolition.[3] That being so, the Certificate of

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3. "Our rebuilding goals included . . . the creation of an efficient new church premises on our own site ..." (Gurley affidavit, 106a). "Our Church is eagerly awaiting the moment when we are

Appropriateness procedure was completely irrelevant.

The gist of the Certificate of Appropriateness procedure is a determination of whether any proposed alteration of any building will really, in the judgment of the Commission, cause the already landmarked building to appreciably lose its "special character or special historical or aesthetic interest or value." *Ibid.* But respondents correctly say that "in determining whether to designate a building a landmark, the *only criterion to be considered is the historical and aesthetic value of the structure iself.*" (Br. 4, 10, emphasis supplied). Nothing in the ordinance (and nothing in respondents' brief) gives any ground for the assumption that any other criterion — *e.g.*, religious need — could possibly have been taken into account had the Church of St. Paul and St. Andrew applied for a Certificate of Appropriateness. Therefore the underlying premise of the Appropriateness procedure is that the aesthetic judgment of the Commission must in all cases override religious choice.

d. Statutory Hardship Procedure (§207-8.0). (Br. 13-15). This procedure would have proved but another cul-de-sac for the Church. It would have afforded no

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free to move forward toward our new building." (Richmond affidavit, 118a). "Plaintiff asserts that, unless it is permitted to demolish the Church, it will be unable to raise sufficient funds to finance its religious and charitable activities." (Affirmation of Assistant Corporation Counsel Rosenberg, Appellant's App., New York Court of Appeals, A35). "[W]e face bankruptcy because of our enormous pending repair costs and because of the high cost of simply trying to maintain the building from day to day. We do not have the funds to renovate our building; even if we had the capital funds for substantial renovation we have no funds to carry the enormous maintenance costs of a renovated building into the future. We have nothing more than a $35,000 endowment left, and any emergency and unavoidable substantial repair bill will wipe us out. . . . In order that the Commission can add us to this 'list' of landmarks, we are to be forced into retaining a *building* that for us is a financial and physical disaster." (George affidavit, 121a, emphasis supplied). *And see*, Berger, *Church Seeks To End Status As Landmark*, N.Y. Times, Sept. 3, 1986, at B1, col. 5.

"ample protection" (Br. 13) whatever to the Church. As respondents recite, the Church, to make use of this avenue, would have had to put its property up for sale or lease. (Br. 14). Respondents thus promptly back away from having, unaccountably, invited the Court to devote its attention to this irrelevant item. (Br. 15). The Court of Appeals itself held this procedure inapplicable. (4a, n. 2).

e. The "Judically Created Hardship" Avenue. Respondents cite *Lutheran Church In America v. City of New York*, 35 N.Y.2d 121 (1974) as authority for an argument that, had the Church but applied to the *Commission* for relief, the *Commission* could have granted it, possibly quite speedily. (Br. 38-40). The Commission cites, as examples of its liberality, a completely undocumented narrative concerning the Episcopal Diocese of Brooklyn (Br. 38-40) and *1025 Fifth Avenue, Inc. v. Marymount School of New York*, 475 N.Y.S.2d 182, 123 Misc. 2d 756 (N.Y.Sup. Ct. 1983). (Br. 40-42).[4] *Lutheran Church* is no authority awarding power to the

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4. The Commission's reliance upon *1025 Fifth Avenue, Inc. v. Marymount School of New York* is misplaced. *Marymount* involved a challenge by adjacent property owners to a Commission decision that Marymount, a commercial nonprofit institution, could build a gymnasium on nonlandmarked buildings located in an historic district. Marymount had applied to the Commission for a Certificate of Appropriateness to proceed with building the gymnasium. The Commission denied the application, but allowed Marymount to proceed with alterations finding Marymount had shown insufficient return because it could not carry out its purposes without building the gymnasium.

The court in *Marymount* held that the Commission had jurisdiction to apply the "common law" hardship test created in *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968) and *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). This holding, however, has never been approved by the New York Court of Appeals. (4a, n.2). In the present case, the dissent in the Court of Appeals specifically challenges the authority of the Commission to apply a constitutional test reserved to the courts and never written into the statute by the New York legislature. (*See*, 26a-28a).

Commission to evaluate hardship, especially religious hardship. In that case the court simply held the landmark designation of a church's office building to be "nothing short of a naked taking." *Lutheran Church*, 35 N.Y.2d at 131. Respondents attempt to utilize *Lutheran Church* to set up the Commission as a District Board of Church Location and Building[5], with the intrusive power to override, for aesthetic reasons, religious judgments of the Church and to pass upon questions of a most sensitive kind, relating to a religious congregation, stewardship of church finances, the plan of a house of worship, etc. — but without the slightest degree of right, knowledge or competence to weigh and resolve such questions.

3. *That the Church could not legally have suffered a deprivation of due process or free exercise unless there had been an actual "taking" of its house of worship, and there has been no "taking"*. (Br. 25-30). This argument is fallacious in two respects. First, it is obviously untrue to say that a statute could never offend due process or free exercise unless it would be of such a nature as to constitute a "taking", or appropriation of property. Surely an ordinance which would forbid churches to hold services on but one day of the week would not constitute a "taking" but would also presumptively constitute a denial both of due process and free exercise. Here the landmarking of the Church of St. Paul and St. Andrew inflicts worse damage, not only threatening the Church with certain extinction, but at this very moment (as for the past seven years) actively hastening that extinction.

Second, what constitutes a "taking" depends in part upon the nature of the thing taken and (as respondents'

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5. Which is the organ established by United Methodist Church to pass upon questions pertaining to the best uses of Church property for the Church's religious ends (and hence, necessarily, related issues of hardship). THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH §§2415-2418 (1976).

citation to *Williamson*[6] notes (Br. 26-27)), the degree "at which regulation becomes so onerous that it has the same effect as an appropriation . . . ." The record in the present case abundantly establishes that that point has long since been passed in the application of the Landmarks Law to St. Paul and St. Andrew. The designation, five years ago,, produced a continuing crisis of financial deprivation, the coerced diversion of the congregation's funds to support a public cultural program, and the virtual destruction of the Church's capacity to plan for its survival according to its religious nature. (38a, 103a-105a, 110a, 115a, 121a).

There is no substance to respondents' contention that, because the Church has not yet been the object of prosecutorial action under the ordinance, it is thereby unharmed despite the statutory provision for prosecutorial action should it in any way show noncompliance with the ordinance. This Court has held that it is the criminal enforceability of a law, rendering it *presently* coercive, which may be the factor creating its unconstitutionality. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-154 (1967).

Respondents state that the Church's reliance on such cases as *Colautti v. Franklin*, 439 U.S. 379 (1979) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) is "misplaced" because "none of those cases involved, as in the instant case, a statute which allowed individuals to seek an exemption from the statute's application as does the Landmarks Law." (Br. 29). The respondents' misapprehension of the Church's case persists: it is of the essence of the Landmarks Law that it allows no exemptions and that even its "relief" processes allow no

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6. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S.____, 105 S.Ct. 3108 (1985).

other criteria for "relief" than aesthetic and other cultural factors. But a church is "not just a piece of real estate". Rather, it is "the outward symbol of a religious faith". *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 121 (1952) (Frankfurter, J., concurring).

CONCLUSION

For the foregoing reasons, responsive to the arguments contained in the Brief In Opposition, it would appear that summary reversal would be in order, but that, in any event, the petition should be granted.

Respectfully submitted,

Of Counsel:

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

WILLIAM BENTLEY BALL
Counsel of Record

PHILIP J. MURREN
SANDRA E. WISE

ELLIS, STRINGFELLOW, PATTON & LEIBOVITZ
51 East 42nd Street
New York, NY 10017
(212) 867-0180

FRANK PATTON, JR.
WILLIAM LEIBOVITZ
Counsel for Petitioner

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No. 86-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,
Petitioner,

v.

KENT L. BARWICK, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF FOR THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., NEW YORK STATE COUNCIL OF CHURCHES, INC., THE COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, AND QUEENS FEDERATION OF CHURCHES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

EARL W. TRENT, JR.
National Ministries
American Baptist Churches in the U.S.A.
Valley Forge, Pennsylvania 19481
(215) 768-2487
Counsel for Amici Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

I. May a municipality, consistent with the Free Exercise Clause of the First Amendment, permanently commandeer or sequestrate the exterior facade of a church building over the continuous objection of the church congregation which owns, occupies and operates it as an active house of worship, without compensation, not for reasons of public health or safety, nor to use the property for other compelling public purposes, but solely for aesthetic purposes?

II. May the municipality also require the congregation and its leaders, under pain of criminal penalties, to maintain the facade in its present (or equivalent) condition at their own expense, using resources donated for religious ministries, whether or not any are left for the free exercise of religion?

III. May the church congregation be required to apply for relief to the very municipal agency that commandeered its property in the first place and to prove its condition of "hardship" to submit its inventory of assets, its program and budget, its fund-raising prospects, its plans and aspirations for religious ministries, liturgical observances, and community service, which determine the uses of its premises, for evaluation, disputation and possible modification by civil appointees whose mandate and expertise is architectural, not financial, and certainly not religious.

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Pursuant to Rule 26.1 of the Rules of this Court, the organizations named above filed this brief in support of the instant petition for certiorari. Consent for filing of this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

1. The National Council of the Churches of Christ in the U.S.A. is a community of thirty-one Protestant and Eastern Orthodox communions having an aggregate constituency of over forty million members in the United States. These national religious bodies are deeply concerned about the effect which this case and its disposition will have on the free exercise of religion of their constituent congregations across the entire country.

2. The New York State Council of Churches is a not for profit corporation in the State of New York that has served the Protestant constituency of New York for more than a century. It has a long tradition of involvement in seeking justice and equity in matters of church and state. It is particularly concerned at this time about the impact of New York City and New York State laws regarding landmarking. New York City laws clearly make it possible for municipal government to usurp the mission of a local church, its related judicatory and denomination.

3. The Council of Churches of the City of New York represents over 1,600 Protestant and Orthodox congregations and 27 denominations and affiliated agencies. With them it shares a belief in one Lord, Jesus Christ, and works to strengthen the social, moral and spiritual quality of life in the City. It began its work in 1815 as the Brooklyn Mission Society, and is the oldest ecumenical organization in the nation. The Council is deeply concerned that landmark status restrains the opportunity for churches to serve God as they see fit.

4. Queens Federation of Churches, organized in 1931 serves over 600 Christian Churches in the Borough of Queens, City of New York, it is profoundly concerned that churches be able to use their own resources in fulfillment of the ministry to which God calls them. It sees landmarking of religious property as imposing a requirement that government permission be obtained in order to use church property for religious ministry.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

"U.S. Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

New York City Landmarks Preservation Law (N.Y.C. Admin. Code, Ch.8-A, § 205-1.0 and § 207-1.0, *et seq.*)

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The questions to be decided are not administrative, but constitutional, not whether the Commission has decided the matter wisely, or whether it will handle the "hardship" proceeding compassionately, but rather, whether it has any "authority to adjudicate" the matter at all. *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. ____, 105 S.Ct. 3325, 3332-33 (1985). The Commission is not in a position to decide constitutional questions, and certainly cannot be expected to do so against its own supposed interest. Moreover, the New York courts have failed to recognize and protect the important free exercise interests at stake here.

The New York situation complained of in this case is not a condition of religious liberty, but its opposite, religious oppression, and should not be permitted under the Constitution of the

United States. The remedy proposed by the courts of New York is not a remedy, but an exacerbation of the problem, since it leaves the church's religious freedom in the hands of the civic agency which originally impaired it.

Even if all members of the Commission were theologians or ordained clergy, as civil appointees they must be considered "outsiders," and as such, they have no business making decisions for a functioning and competent church body. The prospect of any religious body having to submit its programmatic plans and budget, all of which are based upon religious considerations and commitments, to a civic agency for approval is anathema to *amici* and contrary to the teaching of this Court with respect to the Free Exercise Clause of the First Amendment.

REASONS FOR GRANTING THE WRIT

The outcome of the instant case will have a momentus effect on churches everywhere. A failure of this Court to act will have devastating effects, since the preservationist effort is already far advanced in many regions of the country.

New York State and New York City have led the way in legislation and administration of preservationist interests, and their example is being widely followed throughout the land. Consequently, many denominations in many localities are beginning to encounter the same difficulties that the United Methodist Church of St. Paul and St. Andrew is resisting in the instant case.

The churches represented in this brief are not opposed to architectural preservation as such. Since the beginning of the colonial period, churches have erected, maintained and cherished some of the finest ecclesiastical architecture in this country. It is therefore most ironic that it is this distinction which places the church at the center of this dispute. In New York City, for example, more than 14 percent of the site-designated landmarks are religious buildings. Religious buildings com-

prise less than 0.34 percent of the buildings in the City of New York. In other words, churches and synagogues are forty-two times more likely to be designated as landmarks than any other buildings in the city.[1]

In a valiant effort to celibrate and conserve the architectural mastery of the churches' structures, the preservationist movement would actually destroy the churches' ministry. Like the now extinct Bald Eagle, another great American symbol of mastery, the church has fallen prey to the very excellence which accorded it distinction, and is now left to be stuffed and mounted for mere asthetic appreciation.

The church is not without appreciation for the ornate intricacies of its property. Nevertheless, in recognition of its primary role in the community, the church has had to withstand the temptation to value its buildings over its ministry meeting and serving the needs of human beings. When balancing the two, more weight must be placed on its ministry. To do otherwise could be tantamount to idolatry. The concentration of its resources on the exterior facade creates the "edifice complex" which theologian Gibson Winter described in criticizing churches which are more attached to their large, ornate, cathedral-like structures than to adapting to the spiritual needs of a mobile population.[2] Thus, the civic designation of church buildings as "landmarks," which serves to freeze them in the forms and functions of the past, is in direct contradiction to the church's free exercise of its faith as guaranteed by the first amendment.

Such civil action focuses attention solely on the immutability of the outward appearance of the church building rather than on the mutable ministrations to the ever-changing spiritual and

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[1] L'Heureux, N.J., "Ministry v. Mortar: A Landmark Conflict,: in Kelley, Dean M., ed., *Government Intervention in Religious Affairs*, 2, N.Y., Pilgrim Press, 1986, p. 168.

[2] Winter, G., *The Suburban Captivity of the Churches*, Garden City, Doubleday, 1961, p. 148.

social needs of the human beings within. In effect, it transmutes the church building into a civic museum, maintained as an ornate shell commemorating the grandeur of bygone vitality and aspiration. The pattern of governmental expropriation of church buildings for use as museums is usually associated with the Soviet Union, but there the government at least pays for the upkeep of the structure. Under New York's Landmarks Preservation statute, the church congregation itself is obliged—under criminal penalties to pay the cost of maintaining outmoded and deteriorating architecture for its supposed aesthetic effect, a burden that can quickly exhaust the devotion and extinguish the good will of the congregation, who resent having to feed an insatiable architectural incubus before they can minister to the spiritual needs of living men, women and children.

This concern of the churches does not exclude the possibility that some congregations may be gratified and encouraged to have their church building(s) designated as landmarks. Where the congregation consents, the situation is entirely different. A time may come when the landmarked building is no longer suitable for its original, religious purpose. At that time the church must be able to withdraw its consent and the designation consequently be vacated. In the Final Report of the Interfaith Commission to Study The Landmarking of Religious Property (hereafter cited as the "Interfaith Commission"), the religious leaders of the City of New York seek a revision of the law. The proposed revision would make the landmarking of churches and synagogues contingent upon the consent of the religious body concerned,[3] unfortunately, the legislature has not yet amended the law, in part because of the organized opposition of historic preservationists, most of whom have not contributed a cent to the construction or upkeep of the landmarked church structures, and will not do so in the future.

The churches represented by this brief are troubled about the effect upon religious liberty of permitting a municipality to

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[3] *See* L'Heureux, *op. cit.*, pp. 178-79.

take over control of the outside of a church, in perpetuity, and to require the voluntary, worshiping congregation, under criminal penalties, to maintain the facade in its present condition, whether or not it has money left for religion.

The churches are even more concerned about the effect of the decisions of the New York courts, which would leave the church no remedy but to submit to the unfettered discretion of the Landmarks Preservation Commission, which has hitherto shown no comprehension of, or compassion for, the religious needs of churches. Indeed, the Commission is not equipped, able, or even inclined to weigh financial, let alone religious, considerations in its deliberations. Although the Commission may be qualified to supervise the replacement of decaying limestone cornices with identical terra cotta limestone (which in turn will soon decay under the impact of modern automotive exhaust fumes), the Commission is not qualified to weigh the merits of the former as against expanding kitchen facilities and constructing access ramps for the senior-citizen feeding programs, which further the church's religious outreach in the community.

The Writ should be granted because this case is of great national importance and because it has been decided in a way that is inconsistent with principles applied in prior decisions of this Court.

I. THE DESIGNATION OF THE CHURCH OF ST. PAUL AND ST. ANDREW AS A LANDMARK IMPOSES AN IMPERMISSIBLE BURDEN ON THE FREE EXERCISE OF RELIGION.

The United States Supreme Court has adopted a balancing test to be applied to determine when the government has violated the free exercise of religion. This test, as announced in *Braunfeld* v. *Brown*, 366 U.S. 599, (1961) is:

> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goal, the statute is valud

> despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose a burden.*

Id. at 607 (emphasis added).

The *Braunfeld* test is applicable to landmark statutes because they are general laws which advance the State's purpose while burdening religion. The purpose of the landmarks statute—to preserve examples of significant architecture, § 205-1.0(b)—may be a valid secular purpose; however, it does not meet the *Braunfeld* test as refined by *Sherbert* v. *Verner*, 374 U.S. 398 (1963), where this Court stated that there must be some "compelling interest . . . [to justify] the substantial infringement of appellant's first amendment right." *Id.* at 406. Thus, applying the *Sherbert* test, the State must meet a substantially higher standard when landmarking religious property.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court, noting the need for formal education of Amish children, nevertheless remarked that the values underlying the religious clauses of the first amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* at 214.

As Former Chief Justice Burger wrote for the Court in *Yoder*, and was later reiterated in *McDaniel* v. *Paty*, 435 U.S. 618 (1978):

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Wisconsin v. *Yoder*, 406 U.S. 205, 215 (1972).

No one has contended that the United Methodist Church of St. Paul and St. Andrew is not a bona fide religious organization, that its members are not sincere in their religious professions, or that they are not making a "legitimate claim to the free exercise of religion." The court below, however, seemed to

consider that the landmark designation does not impose a burden,—or does not *yet* impose a *direct* burden—on the church's free exercise of religion:

> We recognize that religious institutions "enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of police powers" and that courts have declined to enforce zoning ordinances, for examples, where the restrictions, if enforced, would prohibit or directly impinge upon religious uses. But no such direct impingement is involved. The ultimate effect, if any, on plaintiff's religious activities will be not direct, but purely consequential . . . (citations omitted)[4]

The court's distinction between direct and consequential denials of religious liberty is not the law. Whether the state criminally punishes the practice of religion, or criminally punishes the failure to divert to the state's purposes all the funds that would have been used to support the practice of religion, is of little moment. The burden on religion is equally destructive. Certainly the "consequential" burden here is far greater than the "consequential" burdens struck down in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), and *Sherbert*. The risk that public high school could detroy the faith of Amish children in *Yoder*, was certainly no greater, and probably not as great, as the near certainty that the financial burdens of landmarking will destroy the congregation of St. Paul and St. Andrew.

It is true that designation of the church building as a landmark does not prevent the preacher from delivering a sermon, the congregation from praying, or the children from studying the Bible in church school. But in imposing requirements of maintenance and repair, enforceable by criminal sanctions, upon the congregation and its leaders, the landmark designa-

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[4] *Church of St. Paul and St. Andrew* v. *Barwick* 67 N.Y.2d 510, 496 N.E. 2nd 183, 505 N.Y.S.2nd 24, (1968) as an appendix to Petitioner's brief.

tion acts as a tax upon the assets of the church, and in this case, as a confiscatory tax, pre-empting the lion's share of its donated income prior to the meeting of other expenses, which are not enforceable by criminal sanctions.

The Supreme Court of the United States said, concerning a relatively nominal licensing fee for religious colporteurs:

> It could hardly be denied that a tax laid specifically on the exercise of those freedoms (of religion, speech and press) would be unconstitutional. Yet the license tax imposed by this ordinance is in substance is in substance just that.
>
> * * *
>
> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.
>
> * * *
>
> It is . . . a tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution.

Murdock v. *Pennsylvania*, 319 U.S. 105 (1973)

Here the "tax" is more than nominal. Because of the deteriorating fabric of the church building and the meager resources available to the small congregation, the congregation was obliged to expend 70% of its contributed income in 1982 for costs of maintenance and repair, independent of its designation as a landmark. Just to bring its structure up to a "holding" condition would have cost an additional $350,000 in 1982, and would cost much more today, while to stabilize the structure, render it serviceable for current needs and to repristinate the exterior to the satisfaction of the Landmarks Commission would require several million dollars.[5]

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[5] L'Heureux, N.J., *op. cit.*, p. 165.

To the extent that landmark designation requires the expenditure of resources dedicated for religious ministries just to maintain the facade, it pre-empts and consumes funds that are then not available for expenses which are necessary to carry out the mission of the church; namely, paying the pastor, organist, or choir director, providing curricular materials for church-school pupils, meeting the congregation's obligations to the general church for overseas missions, and so on. When the obligations imposed by landmarking must (by force of law and criminal penalties) be given first priority over all other obligations, and must be satisfied in full before any others can be satisfied, the burden upon the free exercise of religion is direct, onerous and unavoidable. To the extent that it requires expenditures to renovate, repair or rebuild the exterior to the demanding standards of the Landmarks Preservation Commission, it will exceed the congregation's normal contributions and became confiscatory and therefore fatal to the life of the church.

The New York Landmark Commission has failed to consider the First Amendment problem which is central to this case. The statute provides that designation of a commercial property will be removed if the commercial property owner demonstrates that the landmark statutes destroys the reasonable use of the property. *Penn Central Transportation Co.* v. *New York City,* 438, U.S. 104 (1978). Yet a religious property which has been so designated is not given this "out" by the statute, even where, as in the case at bar, the church has provided adequate proof that compliance with the obligations attendant to such statutes would preclude its continued use of the property. Is not the reasonable use of religious property entitled to more consideration than commercial property, especially where the state interest is at most aesthetic and not by any means compelling? While landmark designation might not necessarily be confiscatory in every case", it does have that effect . . . where plaintiff is deprived of the reasonable use of its land." *Lutheran Church in America* v. *City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, (1974).

In *Trustees of Sailors' Snug Harbor* v. *Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1968), the New York Supreme Court recognized that the standards for commercial property owners cannot be applied to non-commercial landmark owners. That court enunciated the test for charitable organizations as follows: "[w]here maintenance of the landmark either physically or financial prevents or seriously interferes with carrying out the charitable purpose." 288 N.Y.S.2d at 316. The state has no prerogative to place restrictions on the use to be made by an owner of his own property where constitutionally guaranteed rights are infringed. *Id.* 315. It is clear that the First Amendment protects a church from governmental interference more than commercial property is protected.

The *Sailors' Snug Harbor* test was first applied to a religious organization in *Lutheran Church;* however, the court focused on the "taking" issue, rather than the First Amendment concerns. In that case, the church used the building in question for its administrative offices. Prior to designation, the church had made plans to construct a new building in its stead to better serve the church's needs. *Id.* at 124-25, 316 N.E.2d at 307, 359 N.Y.S.2d at 10-11. Applying the charitable use test, the court found that the landmark statute seriously interfered with the church's charitable uses. *Id.* at 131-32, 316 N.E.2d at 311-12, 359 N.Y.S.2d at 16-17.

As the Church of St. Paul and St. Andrew is a church which seeks the continued use of its property for *worship*, and not merely administrative office space, *amici* respectfully request that this Court consider the question of whether the nonconsensual designation of a church as a landmark imposes an impermissible burden on the free exercise of religion in light of the First Amendment.

Amici are aware, from long experience with many of their local churches, of the discouraging and debilitating effect upon a congregation of having to pour most of its income into the seemingly bottomless pit of the costs of upkeep and repair of an oversize, outmoded and disintegrating church building. While

a congregation can sometimes be inspired and energized to undertake an ambitious campaign to build a *new* church structure, it is much more difficult to elicit interest in maintaining or renovating an *old* one that is daily experienced as inconvenient and inadequate.

If the members of the congregation of the Church of St. Paul and St. Andrew were to lose heart and drift away to other churches (or to none), the church building would soon have to be abandoned, and its demise would be attributable to the civic agency which had so restricted its options and burdened its free exercise. The Landmarks Commission cannot *compel* people to attend or to support a church, and if the members despair of meeting the Commission's requirements, it will have killed the church—a sacrifice of religious liberty to mere aesthetics.

II. THE BURDEN UPON THE FREE EXERCISE OF RELIGION OF THE CHURCH OF ST. PAUL AND ST. ANDREW CANNOT BE JUSTIFIED BY A COMPELLING STATE INTEREST, OR ANY STATE INTEREST WHATEVER.

As the free-exercise cases cited above attest, and *amici* do not dispute, the free exercise of religion can be restricted in the interest of compelling state interests that can be served in no other way, such as protection of public health and safety. But as the minority in the court below correctly observed, landmark designations involve cultural and aesthetic considerations, not health or safety.[6] The majority in the court below did not even reach this issue, nor did it reach the more important first amendment issue, instead holding that the case was unripe for adjudication of constitutional contentions.[7]

Under the police power a church building might be condemned if unsafe for human occupation or infected by con-

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[6] *Church of St. Paul and St. Andrew* v. *Barwick*, app. at 33a.

[7] *Id.* at 505 N.V.S.2d at 33.

tagious disease or permeated by radon gas. It could perhaps be demolished in order to make way for a new highway or as part of a slum-clearance project of urban renewal (*but see Pillar of Fire* v. *Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250 (1973)) if other routes or arrangements are not available. In the first set of cases, the state would be acting pursuant to an interest in health and safety that is both legitimate and compelling. In the second set, it would be acting pursuant to the eminent domain power, and just compensation would be paid. In this case, no compensation will be paid. Equally important, the state has no legitimate interest, compelling or otherwise.

In the landmarking cases, the government does not want the land. It doesn't even want the building for conversion to some secular use. Rather, government wants the sacred architecture itself. It does not want the real estate, but the religious creation. The church has created such buildings to the glory of God, or the inspiration of soul, and the state has no cognizable interest in that creation. The free exercise clause does not prevent the state from building a freeway over the most direct route, even if a church is in the way. But it should prevent the state from taking a sacred object as a pretty bauble that it wants for its own.

The preservation of impressive and memorable architecture, including ecclesiastical architecture, is a laudable undertaking, and governmental support of that undertaking is to be commended. But—at least in the case of churches—it should not be advanced at the expense of the very activity that inspired and created it, lest the result be an array of elaborate but empty carapaces abandoned by their former occupants, who have had to move elsewhere to carry on a living enterprise. The preservation of architectural antiquities simply does not rise to the level of importance accorded the free exercise of religion under the First Amendment of the Constitution of the United States. This was recognized by the minority opinion in the court below:

> As the church contends, the basic issue confronting the Court is which is to be preferred—religious freedom or the

> exercise of architectural and cultural interests. . . . As between the free exercise of religion and the aesthetic and community values involved in landmark preservation, the latter is "outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community."

Church of St. Paul and St. Andrew, 67 N.V. 2d 510 at 525-26, 496, N.E. 2d, 183 at 197, 505 N.Y.S. 2d at 34. Meyer, J., dissenting, quoting *Matter of Westchester Reform Temple* v. *Brown*, 22 N.Y. 2d 488, 239 N.E. 2d 891, 293 N.V.S. 2d, 297.

Amici concede that the state may have an interest in preserving artifacts of culture, but not at the expense of a church's religious practice. Although the New York Court of Appeals in *Society for Ethical Culture* v. *Spatt*, 51 N.Y. 2d 449, 454, 415 N.E. 2d 922, 925, 434 N.Y.S. 2d 922, 935, (1980) found that "a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community," it must be noted that the court did not weigh the benefits of the community against the infringement on the free exercise of religion. Therefore, the instant case is crucial to the further development of the law in the First Amendment?

Failure to recognize this proper ranking of social values will result in the transforming of active, functioning churches into not just museums, but mausoleums.

III. THE REQUIREMENT THAT THE CHURCH OF ST. PAUL AND ST. ANDREW SEEK RELIEF FROM THE VERY CIVIC AGENCY THAT IMPOSED THE BURDEN ON ITS FREE EXERCISE OF RELIGION IS NOT ONLY A COUNSEL OF FUTILITY AND A FURTHER IMPAIRMENT OF ITS RELIGIOUS LIBERTY, BUT WOULD ENTAIL EXCESSIVE ENTANGLEMENT OF GOVERNMENT WITH RELIGION.

The majority of the court below considered that the constitutional claims were raised prematurely because the church had not pursued all of the options provided by the statute. In the view of *amici*, for the church to pursue those options would compromise the very constitutional right sought to be protected: The right not to subject the free exercise of religion to the supervision of a civil administrative agency that has neither the capacity nor the legitimate authority to rule in matters affecting religion.

The free exercise clause protects not only the bare right to worship, but the church's right to manage its own affairs autonomously. *See* Laycock. *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1388-92, 1394-98 (1981). "It is not only the conclusion that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979); *see also Id* at 507-08.

If a municipal agency has arbitrarily, wrongfully, and over the vehement and continuous objections of a church expropriated the exterior of its sacred structure, the church should not then be compelled to sit down with the thief and plead for the return of a portion of the loot. Such a requirement adds insult to injury and is even more offensive than the original taking. In the view of the church, it has been wronged by a civil agency acting under color of law, and the proper remedy to be applied by the courts is to *reverse* the wrong, not to *compound* it by

further progressive indignities at the hands of the very agency that inflicted the wrong in the faint hope that the wrong might be slightly alleviates.[8]

In sum, as stated by the Interfaith Commission:

> In forcing religious organizations to expend their charitable funds for the maintenance and repair obligations of outmoded and inadequate buildings, the City government is, in fact, directing the Church and Synagogue on how it is to use its resources which have been contributed for its religious ministry, not for architectural preservation.[9]

The scenario that must follow the decision of the New York Court of Appeals, if not reversed, necessarily entails extensive and impermissible entanglement of the Church of St. Paul and St. Andrew with the New York City Landmarks Preservation Commission. *Amici* are aware that "excessive entanglement" of government with religion has been identified by this Court as an aspect of establishment of religion, but it has even more direct implications for free exercise.[10]

While it might be argued that churches which are given the dubious distinction of being designated as "landmarks" may apply for a federal grant from the Historic Preservation Fund,[11] the constitutionality of this grant may be seriously questioned in light of the prohibition against the establishment of religion. This Court has set forth the constitutional test for aid to religion in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1976), where it stated that "first, the statute must have a

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[8] The New York City Landmarks Preservation Commission does not have a history of understanding or sympathy for the plight of churches. See the saga of St. Bartholomew's Episcopal Church as related ina civil action no. ____ filed April 8, 1986, in U.S. District Court for the Southern District of N.Y. as well as numerous instances of bureaucratic callousness related in L'Heureux, *supra*, pp. 173 ff.

[9] L'Heureux, *supra*, p. 165, app. at 127a.

[10] *See* Laycock, *supra*, 81 colum.L.Rev. at 1378-88, 1397-98 (1981).

[11] 16 U.S.C. § 470 (1980).

secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . . Finally, the statute must not foster an 'excessive entanglement with religion.'"

In order to demonstrate "hardship" to the satisfaction of the Commission, the church must reveal its available assets, its anticipated income, its prospects for fundraising and its plans for other expenditures that must compete with maintenance and repair of the facade for the available resources. Then the Commission must determine in the light of this data whether the church's plans for demolition and replacement of the present structure (or even for minor exterior alterations or for various alternatives for maintenance and stabilization of the existing structure) are permissible, or whether the expectations of the Commission would constitute a "hardship."

The Commission must make this determination without the benefit of guidelines in the statute under which it operates as to how religious considerations are to be weighed against architectural considerations. Its members have neither the expertise nor the civil capacity to be able to decide such matters. This represents precisely the sort of excessive entanglement of government with religion against which this Court has warned and which would amount to a regression from First Amendment protections achieved to date.

CONCLUSION

Amici submits that a correct application of the First Amendment decisions in the landmark context would require the courts to determine that the excessive regulation of religious organizations and the usurpation of funds which were devoted to religious ministry cannot be justified merely to further the aesthetic benefit of the community.

For the forgoing reasons Amici urge the Court to issue the *Writ of Certiorari* in the instant case.

Respectfully submitted,

EARL W. TRENT, JR.
National Ministries
American Baptist Churches in the U.S.A.
Valley Forge, Pennsylvania 19481
(215) 768-2487
Counsel for Amici Curiae

(5)

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No. 86-397

In The Supreme Court of the United States

October Term, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

vs.

KENT L. BARWICK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND THE NEW YORK BOARD OF RABBIS AS AMICI CURIAE

IRVING L. ROTTER
1 Chase Manhattan Plaza
New York, NY 10005
(212) 422-3000

MARCIA R. EISENBERG
111 West 40th Street
New York, NY 10018
(212) 221-1535

A. DAVID STERN
26 Court Street
Brooklyn, NY 11242
(718) 643-6366

Attorneys for Amici

Dick Bailey Printers. 203 Port Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

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INTEREST OF AMICI CURIAE

The organizations listed below as joining in this brief are national and local organizations of Jewish rabbis and scholars, as well as synagogues and temples which represent the broad spectrum of Jewish religious and communal life in the United States.

The Synagogue Council of America is a coordinating body composed of the Central Conference of American Rabbis, Rabbinical Assembly, Rabbinical Council of America, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America and United Synagogues of America. The Central Conference of American Rabbis, the largest Reform Jewish Rabbinical organization in the world, is intimately involved in a panoply of issues implicating moral, ethical and religious

values. The Rabbinical Assembly, the largest Conservative Jewish Rabbinical organization in the world, is intimately involved with educational, social and legal issues which are significant to the Jewish community. The Rabbinical Council of America, the largest Orthodox Jewish rabbinical organization in the world, is deeply involved in issues relating to social justice and religious freedom. The Union of American Hebrew Congregations, a coordinating body for approximately 820 Reform congregations in the United States, is intimately involved in advancing religious liberty and social freedom. The Union of Orthodox Jewish Congregations of America, a coordinating body for approximately 1,000 Orthodox Jewish congregations in the United States, is dedicated to working for social justice and religious freedom. The United Synagogues of America, a coordinating body for approximately 800 Conservative Jewish congregations, is intimately involved in matter of social and religious significance to the Jewish community.

The six national organizations listed above, each with a unique perspective and outlook, have joined together through the Synagogue Council of America to speak with one voice on issues which are of national significance, have a profound effect on the Jewish community or impair or impinge upon the religious liberties or moral values of any group.

The New York Board of Rabbis, the largest rabbinic organization in the world, with a membership comprised of Orthodox, Conservative and Reform rabbis, is dedicated to social progress and religious freedom. The Board of Rabbis is a principal expositor of the views of the rabbinate of the New York metropolitan area as well as the rabbinate of the State of New York.

These national rabbinic and congregational organizations acting through the Synagogue Council of America, together with the metropolitan New York rabbinate speaking through the New York Board of Rabbis, submit this brief as friends of the Court because this case involves issues of deep and overriding concern to people of all faiths and to the Jewish community in particular. This case presents for adjudication whether the state's police power to protect aesthetic values is of such compelling weight as to subordinate the basic rights of a religious congregation to worship where it sees fit and in the type of structure it deems appropriate. Resolving whether these basic rights fall within the ambit of activity protected by the Free Exercise Clause of the First Amendment is of particular interest to Amici. The New York City Landmarks Preservation Law and similar laws enacted by other states and localities present potentially serious restrictions on a congregation's use of its church or synagogue in the manner best suited to carrying out the congregation's religious goals. Amici respectfully submit that permitting the state to restrict the manner in which a congregation may use its termon based solely upon aesthetic considerations is at variance with established principles of constitutional jurisprudence which mandates accomodation of religious free exercise. *Lynch v. Donnelly,* 465 U.S. 668, (1984). *See also Zorach v. Clauson,* 343 U.S. 306 (1952).

This brief is submitted with the written consent of the parties.

STATEMENT

The Church of St. Paul and St. Andrew, constructed in 1897, is located on a 150-foot by 125-foot plot at the corner of West End Avenue and 86th Street in New York City. The passing years have not been kind to the Church or the congregation. The Church building has deteriorated structurally and Church membership once 1400 has dwindled to approximately 250.

Confronted with the structural decay of the Church building, the congregation, long-active in numerous social and communal programs, was forced to allocate the Church's sparse resources between preventing further deterioration of the Church edifice or fulfilling the primary mission of the Church—teaching, comforting and assisting its parishioners, the economically needy and the spiritually afflicted. Because of the congregation's priorities, little thought, if any, was given to allocating the Church's meager funds to reversing the deterioration of the Church structures and by 1982 the cost of these repairs was estimated at $350,000, approximately 6 times the Church's annual income in that year.[1] (Pet. App. at 92a).

Realizing that it lacked sufficient income to perform adequately its ministry while concurrently remedying the potential safety hazards and structural deficiencies in the Church building, the congregation, in 1975, appointed a committee to develop a plan that would provide a suitable

1. By 1984, the cost of repairs had risen to approximately $500,000; the Church's annual income remained the same (Pet. App. at 103a).

Church edifice while concomitantly affording the congregation with a source of income adequate to perform its ministry to the community. By 1980 the committee had developed a plan which called for demolition of the present Church structure, construction of a more efficient Church building on part of the site and construction of an income-producing residential tower on the remainder. By the time the plan was developed, however, the Church was the subject of landmark proceedings and the committee plan was never acted upon.

In January 1980, the Church membership was notified by the New York City Landmarks Preservation Commission that the Church was being considered for possible landmark designation. The congregation opposed the designation. The Church membership observed that landmark designation would require that the Church be maintained in accordance with applicable landmark regulations at a cost far in excess of the Church's resources. Since the congregation lacked the funds to comply with the regulations, landmark designation would result in the insolvency of the Church and its possible dissolution. The congregation's objections were rejected by the Landmarks Commission and the Church was designated a landmark in 1981. The Landmarks Commission's designation was approved by the New York City Board of Estimate on March 18, 1982.

The Church commenced this action in New York Supreme Court on June 23, 1982. The Church sought declaratory judgment that the New York City Landmarks Preservation Law was unconstitutional as applied to the Church and an injunction against any enforcement of the landmark designation. The Church asserted that landmark designation seriously interfered with the Church's religious and charitable functions because the Landmarks

Preservation Law imposed criminal sanctions on the Church for failure to perform immediate and on-going mandatory maintenance obligations. These strictures, the Church contended, foisted aesthetics over religious freedom in violation of the First Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment and constituted a "taking" of Church property without adequate compensation. Respondents moved for summary judgment asserting, among other grounds, that the action was not sufficiently ripe. Respondents noted that adequate remedies were available to the Church even if it were designated a landmark but these remedies could not be considered in conjunction with landmark designation. The New York Supreme Court while observing that the alternative remedies proposed by Respondents might result in the Church losing control over the reconstruction of its building nonetheless granted Respondent's motion. The New York Supreme Court's decision was affirmed by the Supreme Court, Appellate Division, without opinion, and by the New York Court of Appeals.

DISCUSSION

The present case presents for adjudication an issue of paramount significance—does the state's police power to preserve exemplars of architecture outweigh First Amendment guarantees of religious liberty. In upholding the Church's landmark designation, the New York Court of Appeals gave the issue of infringement on the Church's free exercise rights short shrift, preferring instead to characterize the Church's opposition to landmark status as stemming from an "aversion to ceding control of the [Church] building program to the Commission." *Church of St. Paul and St. Andrew v. Barwick,* 67 NY 2d 510, 517 (1986). The Court of Appeals' unduly narrow approach

ignores established doctrines of First Amendment jurisprudence and is a chilling response to those who view working for the "greater glory of God" as mandating ministering to the needy rather than preserving stones and mortar.

The constitutional guarantees of religious liberty manifest in the First Amendment are the product of the Framers' abiding respect for religious values and their desire to create an atmosphere permeated with a spirit of religious accommodation in which those values could flourish. The spirit of friendship and assistance envisioned by the Framers is epitomized by the Court's statement in *Zorach v. Clauson,* 343 U.S. at 313-314.

> When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

To be sure, the Framers did not intend that religious freedoms contained in the Free Exercise Clause be absolute. It is unassailable that religious rights may be outweighed where compelling interests of health, safety or welfare are implicated. *See e.g., Reynolds v. United States,* 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts,* 321 U.S. 645 (1944) (child labor law); *State ex rel. Swann v. Pack,* 527 S.W. 2d 99, *cert. denied,* 424 U.S. 954 (1976) (church pastor precluded from "handling, displaying or exhibiting" poisonous snakes in a crowded church sanctuary where there were virtually no safeguards and children roamed unattended). This Court has

recognized, however, that fidelity to our national heritage, as well as incontrovertible constitutional principles preclude infringement on religious conduct absent a compelling governmental interest and requires accommodation of religious beliefs. As the Court stated in *Sherbert v. Verner,* "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" 374 U.S. 398, 406 (1963), *quoting Thomas v. Collins,* 323 U.S. 516, 530 (1945); *See also Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). The dispositive jurisprudential precept is that the Constitution "affirmatively mandates accommodation not merely tolerance, of all religions. . . ." *Lynch v. Donnelly,* 465 U.S. 668, (1984).

While the Landmarks Preservation Law is a noble attempt by the City of New York to preserve for future generations designated structures which are deemed by the Landmarks Commission to be paradigms of cultural, architectural, historical or social significance, it cannot be contended that aesthetic preservation rises to the level of a compelling state interest which justifies abridging religious liberties. Nor can it be fairly asserted that accommodating the Church's desire will unduly interfere with the rationale underlying the Landmarks Law or "radically restrict the operating latitude of the legislature." *United States v. Lee,* 455 U.S. 252, 259 (1982), *quoting Braunfeld v. Brown,* 366 U.S. 599, 606 (1961).

Accommodating the religious beliefs of the Church and exempting the Church buildings from the strictures of the Landmarks Law may well deprive New York City of a structure which the Landmarks Commission considered an examplar of the eclecticism that spread through American architecture in the late 19th Century, represen-

ting a fusion of Early Christian, German Romanesque and Italian Renaissance styles. The consequences of failing to accommodate the Church's religious beliefs, while more pleasing to the eye perhaps, are unquestionably profoundly more troubling to the soul. Vaunting aesthetics over religious freedom is not only at odds with our tradition but also produces a perverse result which the Free Exercise Clause was designed to avoid—the congregation will be presented with a Hobson's choice of risking criminal sanctions for failing adequately to maintain the Church in compliance with the strict requirements of the Landmarks Law (New York City Administrative Code §§207-10.0; 207-16.0) or abandoning or dissolving the Church.[2]

Landmarks preservation statutes have been adopted in all 50 states and over 500 municipalities. As this Court observed in *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), the New York City Landmarks Preservation Law is typical of many urban landmark laws. While *Penn Central* established the parameters of permissible state action with respect to the Fourteenth Amendment issue of "taking" without "just compensation" it does not, nor does any other decision of the Court, provide explicit guidance as to whether the

2. The axiological precepts of accommodation which underlie the Court's Free Exercise decisions render *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), wholly beside the point. The issue here is not whether exercise of the state's police power to preserve and protect architectural exemplars constitutes a taking for which the owners have been adequately compensated. As the Court concluded in *Penn Central,* the state's exercise of police power is justified where it is predicated upon a rational basis and related to a colorable state interest. Existence of a rationale basis is insufficient where religious freedoms are implicated. *Sherbert v. Verner; supra; Wisconsin v. Yoder, supra.*

state's desire to preserve architectural aesthetics is a sufficiently compelling interest to overbear free exercise rights. Amici respectfully submit that religious liberty is a more significant societal interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING L. ROTTER
1 Chase Manhattan Plaza
New York, NY 10005
(212) 422-3000

MARCIA R. EISENBERG
111 West 40th Street
New York, NY 10018
(212) 221-1535

A. DAVID STERN
26 Court Street
Brooklyn, NY 11242
(718) 643-6366

Attorneys for Amici

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Respondents.

Brief of the Roman Catholic Archdiocese of New York and the Roman Catholic Diocese of Brooklyn, New York, as *Amici Curiae* in Support of the Petition for a Writ of Certiorari to the New York Court of Appeals

GEORGE J. MCCORMACK
Counsel of Record for Amici Curiae

GEORGE A. PHILLIPS
CUSACK & STILES
Counsel for the Roman Catholic Archdiocese of New York, Amicus Curiae
61 Broadway
New York, New York 10006
(212) 480-0400

KEVIN M. KEARNEY
HURLEY, KEARNEY & LANE
Counsel for the Roman Catholic Diocese of Brooklyn, New York, Amicus Curiae
32 Court Street
Brooklyn, New York 11201
(718) 852-5900

Questions Presented

I. Is the matter ripe for adjudication?

II. Is the proffered "administrative remedy" illusory, religiously discriminatory and/or otherwise Constitutionally defective?

III. Does the New York City landmarks law, and the scenario whereby a building is designated as a landmark, meet the minimal Constitutional standards guaranteeing:

A. freedom from governmental interference with the free exercise of religion,

B. due process of law,

C. just compensation for a governmental taking of property, and

D. equal protection of laws?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

v.

KENT L. BARWICK, et. al.,

Respondents.

Brief of the Roman Catholic Archdiocese of New York and the Roman Catholic Diocese of Brooklyn, New York, as *Amici Curiae* in Support of the Petition for a Writ of Certiorari to the New York Court of Appeals

Interest of the *Amici Curiae*

The Archdiocese of New York is a diocese of the Roman Catholic Church with ecclesiastical jurisdiction in the Counties of New York, Bronx and Richmond in New York City, and in seven other counties of the State of New York. It is administered by the Archbishop of New York, His Eminence John Cardinal O'Connor, who exercises authority over 410 parishes having over 1,200 structures, serving an area with a total population of more than 5,000,000 of whom approximately 1,8000,000 are Catholics.

The Diocese of Brooklyn is a diocese of the Roman Catholic Church with ecclesiastical jurisdiction in the New York City Counties of Kings (Brooklyn) and Queens. It is administered by the Bishop of Brooklyn, His Excellency Francis J. Mugavero, who exercises authority over 221 parishes having over 600 structures, serving an area with a total population of more than 4,000,000 of whom approximately 1,400,000 are Catholics.

The interest of the *amici curiae* is not primarily based on the fact that they have contributed a very large number of low-rise, distinctive structures for the free enjoyment of all citizens. In fact, it is their desire and expectation that this ancient architectural tradition will continue. Far more importantly, they are

deeply concerned that, in the occasional cases wherein religious structures need to be modified, demolished or replaced in order to carry on the overriding religious mission and ministry of the *amici curiae* and of all religious owners, these valuable properties, and potentially all other resources of the owning religious organizations, resources that were and will be contributed to serve the cause of religion, are being confiscated by government without compensation to serve the non-religious cause, however worthy, of historic preservation.

The *amici curiae* urge this Court to recognize the harsh economic realities that make Petitioner's case ripe for adjudication, to recognize the illusory, discriminatory and unconstitutional nature of the proffered "administrative remedy," to recognize the fundamental importance of the Constitutional issues to a free society and to grant the petition for a writ of certiorari to the New York Court of Appeals.

REASONS FOR GRANTING THE WRIT

The *amici curiae* respectfully submit that there is persuasive reason for granting Petitioner's application for a writ of certiorari.

I. The matter is ripe for adjudication.

That the matter became ripe for adjudication at the moment in which Petitioner's house of worship was designated as a landmark is amply shown by the Petition herein and by the dissenting opinion below. It is, moreover, interesting to note that the majority opinion below nowhere denies any of the following facts:

A. That, from the moment of the landmark designation, Petitioner acquired and, at heavy additional cost, has been fulfilling the resultant new obligation to preserve the external historic appearance of its unwanted and religiously detrimental structure.

B. That, from the moment of the landmark designation, funds contributed and to be contributed for religious purposes by law must be, and have been, continuously diverted to serve the cause of historic preservation, contrary to the spending priorities established by the religious organization owning those funds.

C. That, from the moment of the landmark designation, criminal penalties have been in force to compel the perpetual, first-priority, allocation of the present and future resources of the religious organization (other than its landmarked structure), to the extent and in the manner deemed advisable by the government, to insure the perpetual preservation of the original appearance of the exterior of that structure.

D. That, from the moment of, and solely because of, the landmark designation, Petitioner has been unable to develop its real property in accordance with an "as-of-right" development plan available to all similarly situated non-landmarked owners, and that the resultant prevention of any income from its real property has constituted and continues to constitute a severe and ever-increasing daily economic loss to Petitioner, threatening its very existence as a religious (as distinct from a preservationist) community.

E. That Petitioner has not yet been able to present to a court the question whether the facts set forth above constitute governmental interference with the free exercise of religion because the case was disposed of summarily.

There is nothing more that can "ripen" with respect to the crushing impact of the landmark designation upon the Petitioner. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967); Davis, *Administrative Law*, Vol. 4, §25.7 (3d Ed.).

II. The "administrative remedy" proffered to Petitioner:

A. denies due process,

B. necessitates an unconstitutional entanglement by government with the internal religious affairs of Petitioner,

C. is illusory,

D. discriminates on its face against charitable (religious) owners.

A. Lack of Due Process

Petitioner ought not be forced to go through an "administrative remedy" procedure that would violate the Constitutional guarantee of due process of law. Such is the case here, because the

"administrative remedy" (the so-called "hardship relief" provisions of the New York City landmarks law) has the following characteristics:

1. It forces the religious owners to appeal before the same non-neutral (preservationist) Commission that had landmarked the building.

2. It does not allow any consideration of the issue whether the landmarking constituted governmental interference with the free exercise of religion or other asserted Constitutional infirmities.

3. It imposes the burden on the charitable (religious) owner to prove a specified type of economic "hardship" caused by the landmarking even though the owner had not been permitted, at the original designation hearing, to show economic, or other interference by the government with its charitable operations. At the initial designation hearing, the owner would not have had that burden of proof.

The situation described above violates Constitutional due process requirements. *Goss v. Lopez*, 419 U.S. 565, 580 (1975); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

B. Governmental Entanglement with Religion

To force a landmarked religious owner to now go through the "hardship relief" remedy would necessitate an unconstitutional entanglement by government in the owner's religious affairs. To determine "hardship" under the provisions of the law (which can only be hypothetical speculations in the case of charitable (religious) owners), the government would be obliged to compel the owner to disclose the following information in order to re-order the owner's spending and mission priorities so as to give absolute, first priority to the preservation of the historical appearance of the landmarked structure:

1. The amount of the religious owner's current income and reserve funds and other assets, including any non-landmarked structures.

2. The adequacy of the religious owner's fund-raising methods and spending policies, including the percentages of funds allocated to staff salaries, worship

and liturgy, religious ministry, educational ministry, humanitarian services, world mission support and building maintenance and repair.

Having extracted this data, the government forces, by threat of criminal sanction, the religious congregation to alter its spending priorities—for example, to reduce or eliminate staff, to sell or rent any of its non-landmarked structures, to curtail or eliminate some or all of its worship and other programs to the extent that the government feels such actions necessary or desirable to insure the preservation of the historical appearance of the landmarked structure. For example, if, in the government's opinion, facade cleaning were inadequate, the religious owner's failure to engage in (adequate) fundraising could be evidence of criminal intent to disobey the law.

These considerations apply with equal violence whether a religious organization needed to sell its structure for demolition, either to re-build or to finance its re-location, or whether it determined that its charitable programs needed funding more than the exterior appearance of its structure.

This fact-gathering, analyzing and re-prioratizing with respect to an organization's religious policies, programs and resources constitutes an extreme example of prohibited governmental entanglement in religious affairs. It is actually a government take-over of the religious policy-making function of a congregation. *Lemon v. Kurtzman,* 403 U.S. 602, 621 (1971); *Walz v. Tax Commission,* 397 U.S. 664, 674 (1970).

C. Illusory nature of the "hardship relief remedy"

No knowledgeable builder will contract to purchase a landmarked commercial structure to alter or demolish it (except perhaps at a distress price) because he could not afford to abide the delays, costs and uncertainties of the whimsical and illusory "hardship relief," or de-landmarking provision of the City landmarks law. But for a religious or other charitable owner, these procedures are even more illusory—they are structured so that religious owners can never furnish the proof of hardship required by the law and thus can never be de-landmarked except perhaps at the whim of a preservationist Commission.

A commercial owner can have its building de-landmarked if, among other things, it proves to the satisfaction of the Commission that the building cannot annually earn at least 6% of its assessed value. (The 6% standard is itself illusory. New York City assesses at about 50% of true market value; thus the 6% standard equals 3% of true market value. The City's professional realtors posit a 10%-12% return as necessary for economic viability.) Furthermore, the religious or other tax-exempt owner, in order to have its property de-landmarked, must *prove* to the satisfaction of the Commission that the landmarked building could not possibly earn each year 6% of its assessed value *if the building were not tax-exempt.* Any data on that point would, of necessity, constitute only speculation, never proof, especially as houses of worship have no record of gross or net income production, having been designed and used for worship, not for commerce. The Commission could *always* refuse to de-landmark a religious building for the "lawful" reason that there was no "proof" of how much income the building could or could not generate if it were not exempt from real property taxation. If the Commission did decide for some reason to de-landmark the building, it would have violated the "proof" requirements of its own statute.

If the Commission did violate its own statute and make a preliminary determination that "hardship" had been *proved* by a religious owner, then it could further delay a proposed sale while it tried to find *another* buyer who would purchase the building "on reasonably equivalent terms and conditions" but who would not alter or demolish the building. What builder would even sign a purchase-contract subject to the condition that he must wait for a year or more while the City tries to find someone else to oust him from his desired purchase?

If the Commission failed to find such a substitute purchaser, it can again further delay the contract sale by recommending that the City acquire, by forced condemnation, "a specified appropriate protective interest" in the building, commonly known as a "facade easement." Thus the City, for a few dollars,

for example, can purchase an easement covering a tiny portion of one wall of the building and thus effectively prevent that wall from being demolished and so effectively prevent the site from being re-used for a new building. Faced with such an outcome, what builder would ever sign a contract that would inveigle him into such a trap? He would simply elect to put his time and money into buying some other non-landmarked site. Thus the owner of the church or synagogue is deprived of its market value and has no choice but to forever preserve its unusable building as a museum of architecture.

D. Statutory Discrimination on face against charitable (religious) owners.

The so-called "hardship" relief provisions of the New York City landmarks law contain a detailed scheme of discrimination against religious and other charitable (tax-exempt) owners, and in favor of commercial and private owners. Thus, the law methodically discriminates in favor of owners who put net sales or rental proceeds in their own pockets and discriminates against owners who re-cycle such proceeds to aid recognized charitable purposes. References below are to the landmarking provisions of the New York City Administrative Code.

(1) Discrimination in the Requirements for Proving "Hardship"

If the Landmarks Preservation Commission makes a preliminary determination that a proposed alteration or demolition would impair the "special character" of a landmarked building, the owner may request that the building nonetheless be de-landmarked on the ground that the landmarking is creating a "hardship." The so-called "hardship" relief provisions of the law discriminate heavily in favor of commercial owners and against religious and other charitable owners, as the following statutory provisions amply demonstrate:

(a) A commercial owner can apply for "hardship" relief (i) if it seeks to demolish its landmarked building in order to construct a new building on the site §107-8.0-b.(1)(a) or (ii)

if it has contracted to sell its building or (iii) if it has leased its building for at least 20 years. But if a religious or other charitable owner desires the first of these three options, it is not eligible to apply for any type of hardship relief, and this is precisely the option Petitioner desires. The religious owner can apply for hardship relief *only* if it has contracted to sell or lease for 20 years. §207-8.0-a.(2)(a).

(b) The commercial owner can also apply for hardship relief for the purpose of altering or demolishing its building in order to terminate its operation on the site. §207-8.0-a.(1)(b)(1)(b). But if a charitable owner desires to do that, it is not eligible for any hardship relief. §207-8.0-a.(2)(d). Thus if communicants of a church or synagogue move to other neighborhoods, the congregation cannot re-locate. It is forever bound to the soil of its original site, obliged to use its resources to preserve in perpetuity its useless building for the sole benefit of those who think buildings are more important than worship and ministry—and who use religious resources to finance that perverse value system.

(c) A commercial owner can obtain "hardship" relief whether or not his landmarked building is still suitable for the business purposes for which the owner had been using it. A religious owner, however, is denied hardship relief if its building is still suitable for the owner's current purposes or if it is still suitable for the original purposes of the religious owner if that owner is still engaged in those purposes. §207-8.0-a.(2)(c). Thus, if a commercial owner has an uneconomical factory building he can get hardship relief even though the building is still suitable for factory use, but if a congregation has an uneconomical church building or synagogue building it cannot get hardship relief because its building is still theoretically suitable for worship.

(d) A commercial owner may apply for "hardship" relief on the grounds (among others) that he "seeks in good faith" to alter or re-construct the building if the Landmarks Preservation Commission should decide to de-landmark it. §207-8.0-a.(1)(b)(2). If a religious or other tax-exempt owner makes such an application, it must be on the grounds that it "seeks *and intends* in good faith" to alter or re-construct the

building if the Landmarks Preservation Commission should decide to de-landmark it. §207-8.0-a.(2)(d)(2). The underlined words indicate a harsher standard arbitrarily imposed on religious or other charitable owners.

(e) This same harsher standard is arbitrarily imposed on religious or other charitable owners who are seeking to demolish their landmarked buildings. Compare §207-8.0-a.(1)(b)(1) with §207-8.0-a.(2)(d)(1).

(f) A commercial owner, to show hardship, must prove, among other things, that its building cannot earn 6% of its assessed value per year. §207-8.0-a.(1)(a); §207-1.0-v. A religious owner in such case must prove that its house of worship could not earn 6% of its assessed value per year *if it were not tax-exempt.* §207-8.0-a.(2)(b); §207-1.0-v. This discriminates against religious owners, not only because economic *proof* can never be given for a non-possible hypothetical situation, but because the law assumes that all buildings are designed to produce income and that commercially useless buildings, designed for worship, while having "special character" for landmarking purposes, have no characteristic to permit de-landmarking.

(2) Discrimination with Respect to the "Alternative Plan"

If the Landmarks Preservation Commission determines that an owner has proved "hardship," it then begins the process of coming up with an "alternative plan" to try to find another builder who would develop the site but without altering or demolishing the landmarked building. The procedural requirements are arbitrarily made far more onerous for religious or other charitable owners than for commercial owners, as shown by the following statutory provisions:

(a) The Landmarks Preservation Commission, in devising its alternative plan, must consult with the commercial owner §207-8.0-b. In the same situation, however, there is no provision for consultation with a religious or other charitable owner. §207-8.0-i.(1). Thus the religious or charitable owner, but not the commercial owner, is prevented from contributing any "input" toward the formulation of the alternative plan and is kept "in the dark" about the fate of its own resources.

(b) The Commission's alternative plan may provide for full or partial tax tax abatement to alleviate economic hardship on a commercial owner. §207-8.0-c. Thus the law, while recognizing that landmarking imposes a special burden, provides no commensurate relief for tax-exempt owners. It has been suggested that this constitutes a dissipation of their constitutionally guaranteed tax-exemption.

(c) If a commercial owner does not like the Commission's alternative plan, he can reject it without giving any reason. §207-8.0-f.(2). A religious or other charitable owner, however, *must* accept the alternative plan, like it or not. §207-8.0-i.(2). Thus the religious, but not a commercial, owner is forced to contract to sell or lease for 20 years with some otherwise unknown substitute purchaser or tenant who may be financially unstable or otherwise unsuitable. The law gives the religious owner no protection against this.

(d) For a commercial owner, the Commission is allowed only 60 days to formulate its alternative plan. §207-8.0-d. For a religious or other charitable owner, it is allowed 180 days to formulate its alternative plan. §207-8.0-i.

(e) The City landmarks law forces a religious or other charitable owner to accept an alternative plan that is "reasonably equivalent" to the terms and conditions of the owner's original contract for sale or lease. §207-8.0-i.(1). As to commercial owners, however, the Landmarks Preservation Commission may not make *any* modification in their original contracts for sale, lease, self-development plans or otherwise. Thus, the bargain originally made by a religious owner, but not by a commercial owner, may be whittled away by the Landmarks Preservation Commission.

(f) For a commercial owner the Commission's alternative plan may permit certain "alterations, construction or reconstruction" not contained in the owner's original agreements. §207-8.0-c. No such leniency or flexibility is allowed religious or other charitable owners.

(g) Although a religious owner, unlike a commercial owner, has no right to reject a "reasonably equivalent" alternative

plan submitted by the Commission, the substitute purchaser or 20-year tenant who was discovered by the Commission is absolutely free, with total impunity, to repudiate that alternative plan even though it had previously agreed with the Commission to accept the plan. §207-8.0-i.(4)(a). Thus the fate of the congregation and its building is transferred to the hands of some strange purchaser or tenant with whom the religious owner never had any dealings and who, at the end of a tortuous de-landmarking proceeding, can reject the alternative plan and throw the religious or other charitable owner back to "square one." No such bizarre contingencies are placed on commercial owners.

(3) Discrimination After De-Landmarking Has Been Granted.

If a commercial owner has proven commercial "hardship" to the Commission's satisfaction and has rejected any alternative plan proposed by the Commission, and if the City has not condemned a facade easement, and when all waiting periods have expired, the Commission is required to issue a notice permitting the owner to proceed with its long-ago proposed alteration or demolition. This notice to proceed is unconditional. §207-8.0-g.(2). But if a religious or other charitable owner has "proven" hypothetical commercial "hardship" to the satisfaction of the Commission and if any new purchaser or tenant discovered by the Commission has rejected the Commission's alternative plan (the religious owner cannot reject the plan) and if the City has not condemned a facade easement and if the more extensive waiting periods applicable to religious and other charitable owners have all expired, the Commissioner is likewise required to issue a notice permitting the religious or charitable owner to proceed with its long-ago proposed alteration or demolition, but the notice to proceed is subject to the following conditions, none of which apply to commercial owners:

(a) The alteration or demolition work must be performed by the religious owner's original contract purchaser or 20-year tenant or the bona fide assignees of such purchaser or tenant (other than the religious or charitable owner itself). §207-8.0-i.(5)(a). If the original contract purchaser or 20-year tenant has gone bankrupt from waiting out this prolonged scenario or has

wisely decided to put its time and money into another non-landmarked location, the efforts of the religious or charitable owner to get de-landmarked are nullified and he is back to "square one" free to start another "hardship" relief application all over again. Thus the fate of the religious owner's building is taken from it and put in the hands of disinterested or perhaps, by this stage, hostile third parties. A commercial owner has no such burden.

(b) The religious owner's original contract purchaser or 20-year tenant must now, pursuant to §207-8.0.i.(5)(a), perform the demolition or alteration work in compliance with §207-8.0-a.(2). This latter Section provides for the furnishing of hypothetical "proof" to the Commission's satisfaction of the inability of the religious structure to earn a specified low commercial return, and for the furnishing of proof that the structure is not suitable for carrying out the owner's present and original charitable purposes, and it requires the "immediate" (sic!) initiation of demolition or alteration as originally proposed years before. If the contract purchaser or tenant does not do the work immediately and does not furnish the above-mentioned "proofs" of the current financial and corporate status of the religious owner, the de-landmarking is forfeited and the owner is back to "square one." The religious owner, unlike the commercial owner, is not allowed to do this work on its building; the congregation can only hope that these strangers will not abort the de-landmarking. Of course, if the economic climate has by then changed, these strangers may desire to abort the de-landmarking, and the law provides the religious or other charitable owner with absolutely no protection against this.

(c) For religious or other charitable owners, the now-permitted alteration or demolition must be undertaken with "reasonable promptness" after the issuance of the notice to proceed. §207-8.0-i.(5)(b). No time requirement of any sort is imposed on commercial owners in this situation.

(4) Discrimination as to the Beneficiaries of De-Landmarking

If a commercial owner proves "hardship" and is de-landmarked, it directly receives all the benefits of the de-landmarking whether as owner of a now de-landmarked unencumbered building or as the beneficiary of a sale or a 20-year lease with either its original purchaser or tenant or, at its option, the new purchaser or tenant discovered by the Commission. A religious or other charitable owner, however, can never again own its de-landmarked building unencumbered because it was not even eligible for hardship relief if it desired to develop and continue to own its land or building. In the case of a contract of sale or a 20-year lease, the religious or other charitable owner has nothing to say about whether it will be dealing with an originally intended purchaser or tenant, or one later discovered by the Commission. And in the latter case, the law makes it painfully clear that the religious or other charitable owner is to have no benefit by providing that the charitable owner *must* enter into an agreement of purchase or lease with the new purchaser or lessee discovered by the Commission, §207-8.0-i.(2), and that the "provisions of this section (prohibiting issuance of demolition or alteration permits unless the law's provisions concerning proof of 'hardship,' the alternative plan and the City's purchase of a facade easement have all been complied with or have time-expired) shall not, after the consummation of such agreement, apply to such purchaser or tenant (discovered by the Commission) or to the heirs, successors or assigns of such purchaser or tenant." §207-8.0-i.(3). So it is clear that the law takes elaborate steps to insure that if a religious or other charitable owner successfully completes a hardship relief procedure, the benefits of its efforts will be conferred on a purchaser or tenant, preferably one discovered and imposed on that owner by the Commission. A commercial owner is not subject to this fatal requirement.

It is clear from the foregoing that the City landmarks law contains a studied pattern of blatant discrimination against religious and charitable owners, as opposed to commercial owners, to make it impossible for them to ever find a builder who would be insane enough to contract to buy their landmarked properties.

III. The New York City landmarks law, and the scenario whereby a building is designated as a landmark, utterly fail to meet the minimal Constitutional standards guaranteeing:

A. freedom from governmental interference with the free exercise of religion;

B. due process of law;

C. just compensation for a governmental taking of property; and

D. equal protection of laws.

A. The unwanted designation of Petitioner's house of worship or any house of worship as a landmark results in governmental interference with the free exercise of religion.

The *amici curiae*, with all the religious communities of our nation, have erected and maintained over the centuries at their own cost, more low-rise, distinctive structures, by far, than any other societal group. Although any passerby is free to enjoy these churches, synagogues and temples, they were built, not for the passerby, but rather to promote the worship of God, to nourish the spiritual life of men and women and to help them better serve their fellow man. The *amici curiae* and the entire religious community of our nation are now profoundly distressed to see the government inverting these values by making these structures more important than the God and the people the structures were erected to serve. The religious communities see the government deciding the budgetary priorities of congregations, forcing their funds to be used, into bankruptcy if necessary, to preserve outmoded and useless structures that now impede the religious mission they were erected to promote. They see government "fossilizing" their structures, thereby preventing alterations needed to carry on religious worship and ministry. They see the perpetual encumbrancing of their lands with "white-elephant" structures thereby destroying the fair resale value of the land so that they can never finance the construction of a new structure to serve people in a new location. They see that, in being thus forever "bound to the soil," they will be unable to continue their centuries-old tradition of incidentally contributing to our architectural heritage by erecting new buildings in new styles of architecture. They

see government "establishing" historic preservation as a cause and value automatically higher than that of religious, educational and humanitarian programs offered to the public by the religious communities and the commandeering of religious resources to finance that value-system. They see preservationists conspiring with "neighbors" who abuse the landmarks laws to preserve their apartment views over low-rise religious structures, thereby imposing illegal spot-zoning on worshipping communities.

The attempted extermination in this case of Petitioner's religious life is only one example. Every fair-minded citizen, whether religious, non-religious or anti-religious, would recoil, as would the framers of our Constitution, at such governmental strangling of religious and related charitable activity.

The problem is nationwide—Boston, San Francisco, Chicago, Buffalo, New York City, to name some places where it has publicly surfaced. In New York State there are about 110 local landmark ordinances, most of which have no hardship relief provisions and all but one or two of which suffer from the same Constitutional defects as the New York City ordinance.

Our nation will rise or fall, not on the quality of our buildings but on the quality of our peoples who in disproportionately large numbers look to the religious communities of America for the spiritual, emotional, humanitarian and material support that the government cannot, and often should not, provide. To permit government to stifle these programs for the benefit of an aesthete elite would be to promote that decadence which some doomsayers claim is already overtaking us.

B. The designation of Petitioner's house of worship as a landmark was effected without due process of law.

The designation of a structure as a landmark is the result of a scenario (a term not lightly chosen) conducted by the New York City Landmarks Preservation Commission that falls far short of Constitutional "due process" requirements. The scenario has the following characteristics:

1. If a structure is 30 years old, the *only* standard needed to make it eligible for designation as a landmark is that it have "special character," an undefined term. No historical or architectural distinction is required. There is no building that

does not have at least some such "special character." Such a "standard" is unconstitutionally vague. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

2. The Commission cannot, by law, take into account the impact, economic or otherwise, that the landmark designation would have on the ability of the religious owner to continue to carry out its religious worship, mission and ministry, or whether it would result in any other Constitutional violation.

3. The Commission schedules a structure for a public hearing on the issue of whether or not the structure should be designated as a landmark by accepting the recommendation and report of its own internal staff that the structure should be designated as a landmark—thereby holding a "public hearing" to determine the very issue it has already determined.

4. The "testimony" at the public hearing is not under oath.

5. The "testimony" on the only issue allowed by law to be considered, namely whether the structure has at least some "special character," is given by witnesses who have no expertise or who are not required to prove their expertise in the field of the special character of structures.

6. Such testimony is accepted from anyone who asks to speak at the "public hearing," whether or not he or she has any legally cognizable interest in the matter.

7. The (complete) file of the Commission relating to the affected structure may or may not, at whim, be made available to the (religious) owner prior to or after the "public hearing."

8. Post-hearing documentary "evidence" may at any time be placed by anyone in the official file of the Commission, prior to its decision. Copies of such "evidence" are not furnished or required to be furnished to the (religious) owner. Since the Commission does not disclose to the owner when its file on a given structure is to be deemed "closed" in preparation for the rendering of the decision, the owner never knows what "new evidence" may have been placed in the file and thus never has the opportunity to rebut such "new evidence."

9. The Commission, as a matter of announced policy, arranges with the city buildings department to deny alteration

or demolition permits for (religious) structures prior to its decision on whether to designate the structure as a landmark, thus "extra-legally" treating unlandmarked structures as if they were landmarked.

10. The Commission can and does defer its decisions indefinitely so that the (religious) owner's position is frozen and it can neither go forward with a judicial appeal nor proceed with its desired modification or other disposition of its structure.

Petitioner has not yet been able to present to a court the question whether the landmark designation scenario described above meets minimal Constitutional standards of due process of law because the case was disposed of summarily. *Goss v. Lopez*, 419 U.S. 656, 580 (1975); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

C. The designation of Petitioner's house of worship as a landmark constituted an unconstitutional taking of property without just compensation.

It is sometimes said that the government is not constitutionally required to compensate an owner for loss resulting from the designation of his structure as a landmark because such a designation is not a "taking" by exercise of the power of eminent domain but rather is the exercise of the "police power" whereby every owner is (rightly) required to maintain and operate his structure so as not to endanger the safety, health or morals of the public. The fundamental distinction between an eminent domain "taking" and an exercise of the police power set forth by Professor Freund in his classic treatise, *The Police Power* at §511, pp. 546-547, is as follows:

> "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the differences between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not."

The New York City landmarks law provides for no compensation for value loss resulting from the imposition of a landmark designation. Yet it cannot seriously be said that the construction

and maintenance over the decades of a (religious) building of "special character" has been harmful to the public. On the contrary, the Landmarks law does not seek to have the landmarked structure razed as dangerous to public safety, health or morals, but rather seeks to force the (religious) owner to preserve it in perpetuity for the benefit of that aesthetically sensitive portion of the public that is able to discern and enjoy its "special character."

This injustice is compounded in landmarking situations. Normally, when the government takes over a building, whether or not for just compensation, it also takes over the cost of maintaining it. As a result of landmarking, however, the religious owner is forever burdened with the cost of maintaining its religiously detrimental structure for the delectation of those passersby who take pleasure in architectural forms.

There is no overriding or compelling state need to landmark religious structures even if the landmarking standards and procedures met minimal Constitutional standards, for the following reasons:

1. It is the centuries-old tradition of our religious communities to erect and maintain low-rise, distinctive houses of worship. This ancient tradition will continue so long as religious congregations have a viable religious life. Every citizen is free to enjoy those buildings whether or not landmark designations are on file. In fact, the buildings existed long before the landmarks law.

2. In those instances when a structure impedes the religious purposes it was erected to serve, the state's overriding and compelling interest is in preserving religious freedom and the religious, educational and humanitarian ministries sponsored by religious organizations—not in preserving every last distinctive building.

3. By fossilizing existing buildings, the landmarks law prevents the release of funds that would be used, where a congregation seeks to relocate, to construct a new house of worship in contemporary architectural style. The law thus cuts off our nation's primary source of future distinctive buildings.

It has been said that this Court has decided that there never need be compensation in landmarking cases, citing *Penn Central Trans. Co. v. City of New York*, 42 N.Y.2d 324, *aff'd* 438 U.S. 104, *reh. den.* 439 U.S. 883 (1978). In fact, however, it was clear that the landmarked owner (Penn Central) received just compensation for the landmarking in the form of expanded transferability of its development (air) rights that increased the value of these rights by many millions, a benefit available *only* because the structure had been landmarked.

Petitioner has not yet been able to present to a court the question whether the landmarking of its church structure constituted an unconstitutional "taking" without just, or any, compensation, because the case was disposed of summarily. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Matter of Westchester Reform Temple v. Brown*, 22 N.Y.2d 488 (1968).

D. The New York City landmarks law deprives Petitioner and the public of equal protection of law.

Under the New York City landmarks law, any item of real or personal property over 30 years old (except interiors of houses of worship) *may* be "nominated" for designation as a landmark either by the Landmarks Preservation Commission or anyone else. However, the law does not *require* the Commission to consider any particular structure, no matter how beautiful, for designation, nor to act upon any request for designation. Thus, the Commission may, at whim, refuse to consider one structure of "special character" but accept for consideration another structure of "special character" (in which latter case designation would be required). For example, when a major New York City developer, Ronson, unearthed the historically important and remarkably preserved hull of an 18th Century merchant ship (the "Ronson Ship"), the Commission was notified but felt that preservation of the hull would be too costly for the developer and simply never scheduled the property for a hearing. Instead, it held a parade at the site to signify the exceptional "special character" of the property and then allowed its destruction so the construction of Ronson's high-rise building would not be delayed. Had a designation hearing been scheduled, of course,

Ronson's economics could not have been considered—only whether the property had "special character."

Again, the Commission decided that the convent of the Little Sisters of the Assumption in Manhattan lacked any "special character," thereby permitting its destruction so that the owner could realize the fair market value of the site. Even superficial comparison would make it apparent that the Convent had far more "special character" than Petitioner's structure.

A law that permits, with impunity, unequal treatment among owners of buildings of "special character" denies the public in general, and Petitioner in particular, the equal protection of law guaranteed by the Constitution. *Carey v. Brown*, 447 U.S. 455 (1980); *Brown v. Board of Education*, 347 U.S. 483 (1954).

Petitioner has not yet been able to present to a court the question whether the New York City landmarks law violates the equal protection guarantee of the Constitution because the case was disposed of summarily.

CONCLUSION

For all the foregoing reasons, the *amici curiae* respectfully urge that a writ of certiorari be issued to the New York Court of Appeals in this case.

Respectfully submitted,

GEORGE J. MCCORMACK
Counsel of Record for Amici Curiae

GEORGE A. PHILLIPS
CUSACK & STILES
Counsel for Roman Catholic Archdiocese of New York, Amicus Curiae
61 Broadway
New York, New York 10006
(212) 480-0400

KEVIN M. KEARNEY
HURLEY, KEARNEY & LANE
Counsel for Roman Catholic Diocese of Brooklyn, Amicus Curiae
32 Court Street
Brooklyn, New York 11201
(718) 852-5900